THIS BOOK CONTAINS THE OFFICIAL

REPORTS OF CASES

DECIDED BETWEEN

DECEMBER 13, 2013 and MAY 1, 2014

IN THE

Supreme Court of Nebraska

NEBRASKA REPORTS

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PEGGY POLACEK

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By Peggy Polacek, Reporter of the Supreme Court
and the Court of Appeals

For the benefit of the State of Nebraska

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DURING THE PERIOD OF THESE REPORTS

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JOHN F. WRIGHT, Associate Justice
WILLIAM M. CONNOLLY, Associate Justice
KENNETH C. STEPHAN, Associate Justice
MICHAEL M. MCCORMACK, Associate Justice
LINDSEY MILLER-LERMAN, Associate Justice
WILLIAM B. CASSEL, Associate Justice

COURT OF APPEALS
DURING THE PERIOD OF THESE REPORTS

EVERETT O. INBODY, Chief Judge
JOHN F. IRWIN, Associate Judge
FRANKIE J. MOORE, Associate Judge
MICHAEL W. PIRTLE, Associate Judge
FRANCIE C. RIEDMANN, Associate Judge
RIKO E. BISHOP, Associate Judge

PEGGY POLACEK . . . . . Reporter
LANET ASMUSSEN . . . . . Clerk
JANICE WALKER . . . . . State Court Administrator

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
First	Clay, Fillmore, Gage, Jefferson, Johnson, Nemaha, Nuckolls, Pawnee, Richardson, Saline, and Thayer	Paul W. Korslund	Beatrice
		Daniel E. Bryan, Jr.	Auburn
		Vicky L. Johnson	Wilber
Second	Cass, Otoe, and Sarpy	William B. Zastera	Papillion
		David K. Arterburn	Papillion
		Max Kelch	Papillion
		Jeffrey J. Funke	Plattsmouth
Third	Lancaster	Paul D. Merritt, Jr.	Lincoln
		Karen B. Flowers	Lincoln
		Steven D. Burns	Lincoln
		John A. Colborn	Lincoln
		Jodi Nelson	Lincoln
		Robert R. Otte	Lincoln
		Andrew R. Jacobsen	Lincoln
		Stephanie F. Stacy	Lincoln
		Lori A. Maret	Lincoln
Fourth	Douglas	Joseph S. Troia	Omaha
		Gary B. Randall	Omaha
		J. Michael Coffey	Omaha
		W. Mark Ashford	Omaha
		Peter C. Bataillon	Omaha
		Gregory M. Schatz	Omaha
		J Russell Derr	Omaha
		James T. Gleason	Omaha
		Thomas A. Otepka	Omaha
		Marlon A. Polk	Omaha
		W. Russell Bowie III	Omaha
		Leigh Ann Retelsdorf	Omaha
		Timothy P. Burns	Omaha
		Duane C. Dougherty	Omaha
		Kimberly Miller Pankonin	Omaha
		Shelly R. Stratman	Omaha

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
Fifth	Boone, Butler, Colfax, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York	Robert R. Steinke Michael J. Owens Mary C. Gilbride James C. Stecker	Columbus Aurora Wahoo Seward
Sixth	Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington	John E. Samson Geoffrey C. Hall Paul J. Vaughan	Blair Fremont Dakota City
Seventh	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	James G. Kube Mark A. Johnson	Madison Madison
Eighth	Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler	Mark D. Kozisek Karin L. Noakes	Ainsworth St. Paul
Ninth	Buffalo and Hall	John P. Icenogle James D. Livingston Teresa K. Luther William T. Wright	Kearney Grand Island Grand Island Kearney
Tenth	Adams, Franklin, Harlan, Kearney, Phelps, and Webster	Stephen R. Illingworth Terri S. Harder	Hastings Minden
Eleventh	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	Donald E. Rowlands James E. Doyle IV David Urbom Richard A. Birch	North Platte Lexington McCook North Platte
Twelfth	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux	Randall L. Lippstreu Leo Dobrovolny Derek C. Weimer Travis P. O'Gorman	Gering Gering Sidney Alliance

JUDICIAL DISTRICTS AND COUNTY JUDGES

Number of District	Counties in District	Judges in District	City
First	Gage, Jefferson, Johnson, Nemaha, Pawnee, Richardson, Saline, and Thayer	Curtis L. Maschman	Falls City
		J. Patrick McArdle	Wilber
		Steven B. Timm	Beatrice
Second	Cass, Otoe, and Sarpy	Robert C. Wester	Papillion
		John F. Steinheider	Nebraska City
		Todd J. Hutton	Papillion
		Stefanie A. Martinez	Papillion
Third	Lancaster	James L. Foster	Lincoln
		Gale Pokorny	Lincoln
		Laurie Yardley	Lincoln
		Susan I. Strong	Lincoln
		Timothy C. Phillips	Lincoln
		Thomas W. Fox	Lincoln
		Matthew L. Acton	Lincoln
Fourth	Douglas	Lawrence E. Barrett	Omaha
		Joseph P. Caniglia	Omaha
		Marcena M. Hendrix	Omaha
		Darryl R. Lowe	Omaha
		John E. Huber	Omaha
		Jeffrey Marcuzzo	Omaha
		Craig Q. McDermott	Omaha
		Susan Bazis	Omaha
		Marcela A. Keim	Omaha
		Sheryl L. Lohaus	Omaha
		Thomas K. Harmon	Omaha
		Derek R. Vaughn	Omaha
Fifth	Boone, Butler, Colfax, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York	Frank J. Skorupa	Columbus
		Patrick R. McDermott	David City
		Linda S. Caster Senff	Aurora
		C. Jo Petersen	Seward
		Stephen R.W. Twiss	Central City

JUDICIAL DISTRICTS AND COUNTY JUDGES

Number of District	Counties in District	Judges in District	City
Sixth	Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington	C. Matthew Samuelson	Blair
		Kurt Rager	Dakota City
		Douglas L. Luebe	Hartington
		Kenneth Vampola	Fremont
Seventh	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Donna F. Taylor	Madison
		Ross A. Stoffer	Pierce
		Michael L. Long	Madison
Eighth	Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler	Alan L. Brodbeck	O'Neill
		James J. Orr	Valentine
		Tami K. Schendt	Broken Bow
Ninth	Buffalo and Hall	Philip M. Martin, Jr.	Grand Island
		Gerald R. Jorgensen, Jr.	Kearney
		Graten D. Beavers	Kearney
		Arthur S. Wetzel	Grand Island
Tenth	Adams, Clay, Fillmore, Franklin, Harlan, Kearney, Nuckolls, Phelps, and Webster	Michael Offner	Hastings
		Michael P. Burns	Hastings
		Timothy E. Hoeft	Holdrege
Eleventh	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	Kent D. Turnbull	North Platte
		Edward D. Steenburg	Ogallala
		Anne Paine	McCook
		Michael E. Piccolo	North Platte
		Jeffrey M. Wightman	Lexington
Twelfth	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux	James M. Worden	Gering
		Randin Roland	Sidney
		Russell W. Harford	Chadron
		Kristen D. Mickey	Gering
		Paul G. Wess	Alliance

SEPARATE JUVENILE COURTS AND JUVENILE COURT JUDGES

County	Judges	City
Douglas	Douglas F. Johnson	Omaha
	Elizabeth Crnkovich	Omaha
	Wadie Thomas	Omaha
	Christopher Kelly	Omaha
	Vernon Daniels	Omaha
Lancaster	Toni G. Thorson	Lincoln
	Linda S. Porter	Lincoln
	Roger J. Heideman	Lincoln
	Reggie L. Ryder	Lincoln
Sarpy	Lawrence D. Gendler	Papillion
	Robert B. O'Neal	Papillion

WORKERS' COMPENSATION COURT AND JUDGES

Judges	City
James R. Coe	Omaha
Laureen K. Van Norman	Lincoln
J. Michael Fitzgerald	Lincoln
Michael K. High	Lincoln
John R. Hoffert	Lincoln
Thomas E. Stine	Omaha
Daniel R. Fridrich	Omaha

ATTORNEYS
Admitted Since the Publication of Volume 286

EMILY HEESCH ANDERSON
AARON C. BOURNE
JOSEPH BURTON BRICKLEMYER
TRACY A. BURNS
JACLYN NOELL CANNADAY
EDWINA MINDY CHRISTIANSEN
ANTHONY PETER DELUCA
ROSS KENT DENHERDER
DANIEL IVAN DITTMAN
NICOLE E. DUCHENEAUX
KRISTA MARIE ECKHOFF
ALEXANDER JOSEPH ESSAY
SIERRA M. FALTER
LAURA ANN FELDMAN
SHAWN DUANE FLINT
ELIZABETH ERIN GASAWAY
JACKIE G. GRAU
MARK A. GRIMES
AARON GEORGE GUNDERSON
CORY LEE HAUSER
NOAH JAMES HEFLIN
ROBERT JOHN HEIECK
CHARLIE GAIL HENDRIX
MIRANDA HOBELMAN
JUSTIN MICHAEL HOCHSTEIN
BRADY JOHN HOEKSTRA
SARA MARIE HUGHES
ERICKA SHEA HUNTER
JONATHAN CARL HUNZEKER
VINOD KUMAR IYER
ALYSSA MARIE JELINSKE
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ROBERT KINNEY-WALKER
RHIANNA A. KITTRELL
BRIAN ROBERT KOHLWES
CHERRY LYNNE KOLB
ALEX KRON
ANTHONY PHILIP LAMB
AMANDA ARLENE LYON
ANNE ELIZABETH MARFISI
MARY KATE MILLERD
SETH JOSEF MOEN
NICK JAMES MONTAGUE
EMMA L. NAGENGAST
THOMAS JAMES O'NEILL III
MARK ROBERT O'SIOCHAIN
ANSHU PASRICHA
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JENNIFER R. PETERSEN
KATHRYN DEAN PUTNAM
JEREMY DAVID RINE
LAWRENCE J. ROLAND
ABBI R. ROMSHEK
COREY THOMAS ROTHROCK
JASEN JOHN RUDOLPH
PEDRO ALONSO SALAZAR
ANNA GENEVIEVE SANDALL
KRISTINE MARIE SCHANBACHER
CALYNN MARIE SCHUCK
BRIAN R. SCHUMACHER
BROCK A. SMITH
TANNER J. SPRACKLEN
KARA E. STOCKDALE
JACOB LAWRENCE STODOLA
NICHOLAS F. SULLIVAN
ANN NICOLE TOSEL

BRIAN CHRISTOPHER TRACY
JUSTIN CHARLES VALENCIA
SARA MARIE WAGERS-JOHNSON
JEFFREY H. WHITE
ADAM J. WINTZ
JESSICA M. WOJTOWICZ
HANNAH CATHERINE
WOOLDRIDGE

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No. S-12-320: **Tuttle v. Bunge Milling, Inc**. Affirmed in part, and in part reversed and remanded with directions. Stephan, J. McCormack, J., participating on briefs.

No. S-12-1020: **State v. Gintonio**. Affirmed. Wright, J.

No. S-12-1226: **In re Trust of Batt**. Affirmed. Cassel, J. Miller-Lerman, J., not participating.

No. S-13-077: **Dushan v. Rischling**. Affirmed. Stephan, J.

No. S-13-372: **State v. Hillard**. Affirmed. Heavican, C.J. Cassel, J., not participating.

No. S-13-502: **Davydzenkava v. Davydzenkau**. Affirmed in part, and in part reversed and remanded for further proceedings. Cassel, J.

No. S-13-530: **State v. Delgado**. Affirmed in part, and in part remanded with directions. Connolly, J.

No. S-13-732: **In re Interest of Taurrencia E**. Affirmed in part, and in part reversed. Connolly, J.

No. S-13-916: **In re Interest of Najazia S**. Affirmed in part, and in part reversed. Stephan, J.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. S-11-814: **State ex rel. Counsel for Dis. v. Gase**. Application for reinstatement of license to practice law in the State of Nebraska granted.

No. S-13-480: **State v. Landera**. Affirmed. See, § 2-107(A)(1); *State v. Miller*, 284 Neb. 498, 822 N.W.2d 360 (2013).

No. S-13-491: **Mid-Plains Comm. Coll. v. Nebraska Comm. Coll. Ins**. Stipulation allowed; appeal dismissed.

No. S-13-721: **State v. Cook**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-14-011: **Farmington Woods Homeowners Assn. v. Wolf**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-14-098: **State v. Armendariz**. Appeal dismissed. See, §§ 2-107(A)(2) and 2-104(C); Neb. Rev. Stat. § 25-1912 (Reissue 2008).

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. S-11-438: **Jacobson v. Shresta**, 21 Neb. App. 102 (2013). Petition of appellant for further review sustained on December 11, 2013.

No. S-11-504: **State v. Kays**, 21 Neb. App. 376 (2013). Petition of appellant for further review sustained on April 16, 2014.

No. A-12-124: **Carper v. Carper**. Petition of appellant for further review denied on March 21, 2014, for lack of jurisdiction.

No. A-12-257: **State v. Podrazo**, 21 Neb. App. 489 (2013). Petition of appellant for further review denied on February 12, 2014.

No. A-12-349: **OSC Ambassador v. Blum**. Petition of appellants for further review denied on March 12, 2014.

No. A-12-461: **Belitz v. Belitz**, 21 Neb. App. 716 (2014). Petitions of appellant for further review denied on April 9, 2014.

No. A-12-547: **Stitch Ranch v. Double B.J. Farms**, 21 Neb. App. 328 (2013). Petition of appellant for further review denied on December 11, 2013.

No. A-12-665: **Frederick v. Merz**. Petition of appellant for further review denied on January 15, 2014.

No. A-12-666: **Biel v. Biel**. Petition of appellant for further review denied on December 18, 2013.

No. A-12-744: **Sweet v. Omaha Pub. Power Dist**. Petition of appellant for further review denied on December 11, 2013.

No. A-12-830: **Shear v. City of Wayne Civil Serv. Comm.**, 21 Neb. App. 644 (2014). Petition of appellant for further review denied on April 16, 2014.

No. A-12-915: **Pope-Gonzalez v. Husker Concrete**, 21 Neb. App. 575 (2013). Petition of appellant for further review denied on March 12, 2014.

No. A-12-951: **State v. Welch**. Petition of appellant for further review denied on January 15, 2014.

No. A-12-963: **Roness v. Wal-Mart Stores**, 21 Neb. App. 211 (2013). Petition of appellee for further review denied on December 11, 2013.

No. A-12-1012: **State v. Lantz**, 21 Neb. App. 679 (2014). Petition of appellant for further review denied on March 12, 2014.

No. A-12-1027: **State on behalf of Savannah E. & Catilyn E. v. Kyle E.**, 21 Neb. App. 409 (2013). Petition of appellant for further review denied on December 11, 2013.

No. S-12-1029: **In re Rolf H. Brennemann Testamentary Trust**, 21 Neb. App. 353 (2013). Petition of appellant for further review sustained on December 31, 2013.

No. S-12-1037: **Wayne G. v. Jacqueline W.**, 21 Neb. App. 551 (2013). Petition of appellant for further review granted on February 12, 2014.

No. S-12-1042: **State Farm Fire & Cas. Co. v. Dantzler**, 21 Neb. App. 564 (2013). Petition of appellee for further review sustained on February 20, 2014.

No. A-12-1043: **Horner v. Horner**. Petition of appellee for further review denied on March 26, 2014.

No. A-12-1055: **In re Interest of Landen W. et al**. Petition of appellant for further review denied on January 15, 2014.

No. A-12-1061: **State v. York**. Petition of appellant for further review denied on December 18, 2013.

No. A-12-1072: **State v. Huff**. Petition of appellant for further review denied on April 9, 2014.

No. A-12-1131: **First State Bank & Trust Co. v. Parkview Development**. Petition of appellant for further review denied on March 26, 2014.

No. A-12-1149: **State v. Haynes**. Petition of appellant for further review denied on April 9, 2014.

No. A-12-1154: **State v. Pierce**. Petition of appellant for further review denied on December 16, 2013, for lack of jurisdiction.

No. A-12-1158: **State v. Robbins**. Petition of appellant for further review denied on January 15, 2014.

No. A-12-1167: **State v. Buttercase**. Petition of appellant for further review denied on February 20, 2014.

No. A-12-1189: **State v. Earith**. Petition of appellant for further review denied on January 15, 2014.

No. A-12-1209: **In re Interest of Damien S**. Petition of appellee for further review denied on January 15, 2014.

No. A-13-025: **State v. Warrack**, 21 Neb. App. 604 (2014). Petition of appellant for further review denied on February 20, 2014.

No. A-13-045: **State v. Rush**. Petition of appellant for further review denied on January 30, 2014.

No. A-13-048: **In re Estate of Bowley**. Petition of appellant for further review denied on March 28, 2014, as filed out of time.

No. S-13-062: **State v. Rodriguez**. Petition of appellant for further review sustained on January 23, 2014.

No. A-13-068: **State v. Seeger**. Petition of appellant for further review denied on April 9, 2014.

No. A-13-072: **State v. Pittman**. Petition of appellant for further review denied on December 18, 2013.

No. A-13-081: **State v. Gomez**. Petition of appellant for further review denied on March 12, 2014.

No. A-13-089: **Rusty's Fertilizer v. Maloley**. Petition of appellant for further review denied on March 12, 2014.

No. A-13-104: **Midland Properties v. Yah**. Petition of appellant for further review denied on January 7, 2014, as untimely.

No. A-13-115: **Duros v. Diversified Enters**. Petition of appellant for further review denied on January 15, 2014.

No. A-13-191: **Brown v. Brown**. Petition of appellant for further review denied on January 23, 2014.

No. A-13-227: **Becerra v. United Parcel Service**. Petition of appellant for further review denied on April 16, 2014.

No. A-13-232: **State v. Wabashaw**. Petition of appellant for further review denied on December 11, 2013.

No. A-13-241: **State v. Esch**. Petition of appellant for further review denied on February 20, 2014.

No. A-13-245: **State v. Camacho**. Petition of appellant for further review denied on April 9, 2014.

No. A-13-330: **State v. Tjaden**. Petition of appellant for further review denied on December 18, 2013.

No. S-13-339: **In re Interest of Joseph S. et al.**, 21 Neb. App. 706 (2014). Petition of appellant for further review sustained on March 12, 2014.

No. A-13-340: **State v. Fuentes**. Petition of appellant for further review denied on April 16, 2014.

No. A-13-342: **In re Interest of Dusti M**. Petition of appellant for further review denied on January 23, 2014.

No. A-13-373: **Eyman v. Eyman**. Petition of appellant for further review denied on April 16, 2014.

No. A-13-385: **State v. Gatto**. Petition of appellant for further review denied on January 15, 2014.

No. A-13-391: **Busch v. Civil Service Commission**, 21 Neb. App. 789 (2014). Petition of appellant for further review denied on April 16, 2014.

No. A-13-394: **Mark J. v. Darla B.**, 21 Neb. App. 770 (2014). Petition of appellant for further review denied on April 16, 2014.

No. A-13-411: **State v. Neuberger**. Petition of appellant for further review denied on April 9, 2014.

No. A-13-414: **State v. Rice**. Petition of appellant for further review denied on April 16, 2014.

No. A-13-422: **State v. Patti**. Petition of appellant for further review denied on March 12, 2014.

No. A-13-428: **In re Interest of Daniel G. et al**. Petition of appellant for further review denied on February 12, 2014.

No. A-13-438: **State v. Mohammad**. Petition of appellant for further review denied on March 12, 2014.

No. A-13-475: **In re Interest of Lisette M**. Petition of appellant for further review denied on April 9, 2014.

No. A-13-505: **State v. Brown**. Petition of appellant for further review denied on April 11, 2014.

No. A-13-515: **State v. Firmanik**. Petition of appellant for further review denied on January 15, 2014.

No. A-13-566: **State v. Torpy**. Petition of appellant for further review denied on January 15, 2014.

No. A-13-583: **State v. Smith**. Petition of appellant for further review denied on April 9, 2014.

No. A-13-601: **In re Interest of Ayodele F**. Petition of appellant for further review denied on April 9, 2014.

No. A-13-628: **Nelson v. Nelson**. Petition of appellant for further review denied on April 11, 2014.

No. A-13-634: **In re Interest of Allen M. et al**. Petition of appellant for further review denied on March 19, 2014.

No. A-13-667: **Benish v. Houston**. Petition of appellant for further review denied on February 28, 2014, as untimely.

No. A-13-714: **State v. Ironbear**. Petition of appellant for further review denied on January 15, 2014.

No. A-13-723: **State v. Collins**. Petition of appellant for further review denied on December 11, 2013.

No. A-13-866: **State v. Barber**. Petition of appellant for further review denied on March 12, 2014.

No. A-13-940: **State v. Voter**. Petition of appellant for further review denied on April 16, 2014.

No. A-13-966: **State v. Clausen**. Petition of appellant for further review denied on April 16, 2014.

MIKE CAREY AND BECKY CAREY, APPELLEES, V. CITY OF HASTINGS, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT.

840 N.W.2d 868

Filed December 13, 2013. No. S-13-110.

1. **Administrative Law: Evidence: Appeal and Error.** In reviewing the decision of an administrative board on a petition in error, both the district court and the appellate court review the decision of the board to determine whether it acted within its jurisdiction and whether the decision of the board is supported by sufficient relevant evidence. The evidence is sufficient, as a matter of law, if an administrative board could reasonably find the facts as it did on the basis of the testimony and exhibits contained in the record before it.
2. **Statutes.** The interpretation of statutes and regulations presents questions of law.
3. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
4. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction is the power of a tribunal to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.
5. ____: ____. Personal jurisdiction is the power of a tribunal to subject and bind a particular person or entity to its decisions.
6. **Statutes: Appeal and Error.** In the absence of a statutory indication to the contrary, an appellate court gives words in a statute their ordinary meaning.
7. **Administrative Law.** In the absence of anything to the contrary, language contained in a rule or regulation is to be given its plain and ordinary meaning.
8. ____. For purposes of construction, a rule or order of an administrative agency is treated like a statute.
9. **Statutes: Intent.** In construing a statute, a court must look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served. A court must then reasonably or liberally construe the statute to achieve the statute's purpose, rather than construing it in a manner that defeats the statutory purpose.
10. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the District Court for Adams County: STEPHEN R. ILLINGWORTH, Judge. Reversed.

Michael O. Mead, Special City Attorney, of Whelan, Scherr, Glen & Mead, P.C., L.L.O., for appellant.

Arthur R. Langvardt, of Langvardt, Valle & James, for appellees.

Robert F. Bartle, Special Assistant Attorney General, of Bartle & Geier Law Firm, for amicus curiae Nebraska Board of Engineers and Architects.

HEAVICAN, C.J., MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

CASSEL, J.

INTRODUCTION

A municipal building inspector denied an application for a building permit because the construction documents were not prepared by a registered design professional. The city's appeals board upheld the denial, but in an error proceeding initiated by the landowners, the district court reversed. The city now appeals. Because the building code mandated preparation of the documents by a registered design professional "where required"[1] by Nebraska statutes, our decision turns upon interpretation of exemptions specified in the Engineers and Architects Regulation Act[2] (Act) and related regulations. We conclude that the appeals board acted within its jurisdiction and that there was sufficient relevant evidence to support a reasonable conclusion that the proposed renovation failed to qualify for statutory and regulatory exemptions to the Act. We therefore reverse the judgment of the district court.

BACKGROUND

Mike Carey and Becky Carey applied for a building permit for an interior renovation of a 10,800-square-foot apartment building located in Hastings, Nebraska. The Careys planned to convert the building's 20 apartment units into 10 apartment

[1] See 2009 International Building Code § 107.1.

[2] Neb. Rev. Stat. § 81-3401 et seq. (Reissue 2008 & Cum. Supp. 2012).

units and to replace the building's electrical and plumbing systems. They did not plan to move or alter the building's load-bearing walls. The proposed renovation also entailed the installation of fire-rated doors at the entrance of each apartment unit and corridor, exit signs above exit doors, and continuous handrails at each flight of stairs.

The building inspector for the City of Hastings denied the Careys a building permit based upon his belief that the construction plans submitted by the Careys were required to be approved by a licensed architect. The applicable building code required submitted construction documents to be prepared by a registered design professional where required by statute. Specifically, § 107.1 of the 2009 International Building Code provided, in pertinent part: "Submittal documents consisting of *construction documents* . . . shall be submitted in two or more sets with each *permit* application. The *construction documents* shall be prepared by a *registered design professional* where required by the statutes of the jurisdiction in which the project is to be constructed." (Emphasis in original.)

Under the Act, criminal liability is attached to the unlicensed practice of architecture or engineering unless such practice is exempt.[3] Section 81-3446(1) provides that the owner of any real property engages in the practice of architecture or engineering when he or she allows a project to be constructed on his or her real property unless a licensed professional is employed to furnish at least minimum construction phase services or the project is exempt from the Act.[4] The building inspector believed that the Careys' proposed renovation did not qualify under any exemption to the Act. He therefore denied the Careys a building permit based upon his belief that the applicable building code required their construction plans to be approved by a licensed architect.

The Careys disputed the denial of the building permit and claimed that their proposed renovation came within an exception to the Act provided by § 81-3449(5). The exception provides that the Act's provisions regulating the practice of

[3] See § 81-3442(1).

[4] See § 81-3446(1).

architecture do not apply to "[a]ny alteration, renovation, or remodeling of a building if the alteration, renovation, or remodeling does not affect architectural or engineering safety features of the building."[5] Because no load-bearing walls were to be moved or altered and safety features were to be added, the Careys contended that the renovation qualified under § 81-3449(5).

The Careys also claimed that a regulation clarifying § 81-3449 established that their project was exempt from the Act. The Careys cited 110 Neb. Admin. Code, ch. 10, § 10.4.1.2 (2008). Section 10.4.1.2 exempts a renovation if the "area of renovation . . . does not adversely impact the mechanical system; the electrical system; the structural integrity; the means of egress; and does not change or come into conflict with the occupancy classification." (An amendment in 2011 did not change the quoted language.) The Careys contended that their renovation came within § 10.4.1.2 because the building's electrical and plumbing systems were to be replaced and would therefore not be adversely affected.

The building inspector then sought an opinion from a compliance officer with Nebraska's Board of Engineers and Architects (state board) whether the Careys' proposed construction plans required a licensed architect's approval. After reviewing the drawings submitted by the Careys, the state board sent the Careys a letter stating that the board believed the renovation was not exempt under § 81-3449(5) because the renovation would affect the building's safety features. The letter further stated that the board believed 110 Neb. Admin. Code, ch. 10, § 10.4.1.2, was inapplicable because the building's mechanical and electrical systems and means of egress would be adversely impacted. The letter explained that the state board concurred with the building inspector's determination that the renovation required the involvement of a licensed design professional and recommended that the city deny a building permit until such a professional was retained.

The Careys appealed the denial of the building permit to the City of Hastings Board of Appeals (appeals board). At the May

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[5] § 81-3449(5).

17, 2011, meeting of the appeals board, the Careys' attorney emphasized that the Careys believed their proposed renovation was exempt from the Act under § 81-3449(5) and 110 Neb. Admin. Code, ch. 10, § 10.4.1.2. The Careys' attorney further asserted that the state board only had the authority to prevent the unauthorized practice of architecture or engineering and did not have the authority to determine whether a building permit should be issued.

One member of the appeals board then commented that the plans submitted by the Careys did not clearly show the existing structure of the building so that a determination could be made as to whether the renovation would have an adverse effect. The board member stated that a design professional was necessary to make that determination. The board member then stated that he "would like to entertain a motion that [the appeals board] uphold the decision from the [state board]." The Careys' attorney immediately clarified that the appeals board was not reviewing the state board's determination, but was reviewing the building inspector's denial of the building permit. The building inspector also emphasized that the focus of the motion should be his denial of the permit. Ultimately, the appeals board's proceedings show that a motion was made by another member of the appeals board to "deny the appeal." The motion was seconded, and all members present voted for the motion. Thus, the Careys' appeal was denied, which effectively upheld the denial of the permit by the building inspector.

The Careys next filed a petition in error in the district court for Adams County pursuant to Neb. Rev. Stat. § 25-1901 et seq. (Reissue 2008). After a hearing, the court entered an order overruling the appeals board and ordering that the Careys be issued a building permit without the requirement of a licensed architect's involvement. The court concluded that the appeals board did not act within its jurisdiction and that there was insufficient evidence to support the permit's denial because the appeals board's decision was "totally based" upon the state board's recommendation. The court further stated that it could find no authority granting the state board the power to make recommendations to local building inspectors and that nothing

within the Act authorized the state board to give advice on local building projects. Finally, the court concluded that even if the Act applied to the Careys' renovation, the project was exempt under § 81-3449(5).

The city filed a timely notice of appeal. Pursuant to statutory authority, we moved the case to our docket.[6]

ASSIGNMENTS OF ERROR

The city assigns that the district court erred in (1) concluding that the appeals board did not fulfill its jurisdictional requirements, (2) concluding that the appeals board's decision was based upon insufficient evidence, and (3) ordering the city to issue a building permit to the Careys without the requirement that they retain a licensed architect.

STANDARD OF REVIEW

[1] In reviewing the decision of an administrative board on a petition in error, both the district court and the appellate court review the decision of the board to determine whether it acted within its jurisdiction and whether the decision of the board is supported by sufficient relevant evidence.[7] The evidence is sufficient, as a matter of law, if an administrative board could reasonably find the facts as it did on the basis of the testimony and exhibits contained in the record before it.[8]

[2,3] The interpretation of statutes and regulations presents questions of law.[9] We independently review questions of law decided by a lower court.[10]

ANALYSIS

Our review in this case is limited to whether the appeals board acted within its jurisdiction and upon sufficient relevant evidence in affirming the denial of the building permit. We first

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[6] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

[7] *Campbell v. Omaha Police & Fire Ret. Sys.*, 268 Neb. 281, 682 N.W.2d 259 (2004).

[8] *Id.*

[9] *Blakely v. Lancaster County*, 284 Neb. 659, 825 N.W.2d 149 (2012).

[10] *Id.*

analyze the basis for the board's jurisdiction and then turn to the sufficiency of the evidence before the board at its May 17, 2011, meeting.

Jurisdiction of Appeals Board

[4,5] The parties agree that the district court's use of the term "jurisdiction" is somewhat of a misnomer in the sense that the court was not referring to subject matter or personal jurisdiction. We have defined subject matter jurisdiction as the power of a tribunal to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.[11] The parties agree that the appeal was correctly addressed to the appeals board, which had the authority to review the denial of the building permit. Personal jurisdiction is the power of a tribunal to subject and bind a particular person or entity to its decisions.[12] Clearly, the city and the Careys were present at the hearing on the Careys' appeal and submitted to the appeals board's jurisdiction of their appeal.

When the district court spoke of jurisdiction, it addressed the appeals board's reliance on the recommendation from the state board. However, this conclusion conflates the issue of jurisdiction with the sufficiency of the evidence. The evidence relied upon by the appeals board had no bearing upon its authority to either affirm or overrule the building inspector's denial of the building permit. The Careys' appeal of the denial of the building permit was properly before the appeals board, which had the authority to affirm or reverse the denial. The court therefore erred in finding that the appeals board acted outside its jurisdiction in affirming the permit's denial.

Sufficiency of Relevant Evidence

The district court concluded that the appeals board's decision to affirm the denial of the building permit was "totally based" on the state board's recommendation that a licensed design professional was required to be retained by the Careys.

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[11] *Young v. Govier & Milone*, 286 Neb. 224, 835 N.W.2d 684 (2013).

[12] *Id.*

The court therefore found that the appeals board's decision was not made upon sufficient relevant evidence. The court further concluded that even if the Act applied, the renovation was exempt under § 81-3449(5).

We disagree with the court's conclusion that the appeals board did not base its decision upon sufficient relevant evidence. We emphasize that in the context of a decision made by an administrative board, evidence is sufficient if the board reasonably could find the facts as it did on the basis of the testimony and exhibits contained in the record before it.[13]

First, the district court's conclusion was based upon an incorrect reading of the appeals board's proceedings. The court partly relied upon one member's statement expressing a desire to "entertain a motion" to uphold the state board's decision. But this overlooks the discussion that followed where the Careys' attorney emphasized the motion should focus on the building inspector's decision and the same member "concur[red]" in that articulation. The court also relied upon a snippet of the discussion where the building inspector appeared to admit that if the state board had disagreed with his conclusion, he would have reversed his ruling. But this was immaterial. The record makes it clear that the inspector had already made his decision. According to the case summary prepared for the appeals board, the Careys were informed in writing on September 14, 2010, of the requirement that the plans be prepared by a licensed architect. The state board's action was not taken until April 22, 2011. The inspector's willingness to reconsider his decision did not amount to an abdication of his decisionmaking authority. Thus, the court's conclusion that the appeals board "totally based" its decision on the state board's recommendation is not supported by the record.

Second, the record includes sufficient relevant evidence from which the appeals board could reasonably find that the Careys' construction plans were required to be approved by a licensed architect under the applicable building code. In addition to the state board's recommendation, the appeals board

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[13] See *Campbell*, *supra* note 7.

was presented with the building inspector's independent conclusion that the Careys' renovation was not exempt from the Act. The building inspector told the appeals board that it was "pretty clear" that the Careys' project required an architect of record under the Act.

[6,7] Third, the evidence reasonably supported the appeals board's conclusion that the Careys' project did not qualify under the statutory or regulatory exemptions to the Act. But before we discuss this evidence, we must examine the statutory and regulatory exemptions without deference to the appeals board's interpretation. In the absence of a statutory indication to the contrary, an appellate court gives words in a statute their ordinary meaning.[14] Likewise, language in a rule or regulation is to be given its plain and ordinary meaning.[15]

Contrary to the Careys' argument, § 81-3449(5) did not exempt their project from the Act. Section 81-3449(5) exempts "[a]ny alteration, renovation, or remodeling of a building if the alteration, renovation, or remodeling does not affect architectural or engineering safety features of the building." The Careys argue that "no existing architectural or engineering safety features are affected by the remodeling involved here, although certain modern safety features arising in the fire codes are being added, under the supervision of the state fire marshal and the city's building inspectors."[16] Thus, the Careys implicitly argue that because these safety features were governed by fire codes, they are not "architectural" safety features. We disagree. The practice of architecture includes "services in connection with the design and . . . alteration of a building."[17] Design, in turn, means the "preparation of schematics, layouts, plans, drawings, specifications, calculations, and other diagnostic documents which show the features, scope, and detail of an architectural or engineering work to be executed."[18]

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[14] *Vlach v. Vlach*, 286 Neb. 141, 835 N.W.2d 72 (2013).

[15] See *Belle Terrace v. State*, 274 Neb. 612, 742 N.W.2d 237 (2007).

[16] Brief for appellees at 13.

[17] § 81-3420.

[18] § 81-3409.

Compliance with fire, building, plumbing, and similar codes clearly requires such layouts, plans, drawings, and specifications to incorporate the necessary features in the design of a project. The design of the Careys' renovation entailed the installation of fire-rated doors at the entrance of each apartment unit and corridor, exit signs above each exit door, and a continuous handrail at each flight of stairs. Thus, the evidence was sufficient to reasonably support the conclusion that the renovation would affect the building's safety features and was thereby not exempt from the Act.

[8,9] Similarly, the regulatory exemption did not apply. The exemption provided by § 10.4.1.2 applies if the "area of renovation . . . does not adversely impact the mechanical system; the electrical system; the structural integrity; the means of egress; and does not change or come into conflict with the occupancy classification."[19] In analyzing this exemption, we first reject the Careys' interpretation that a renovation that entails the replacement of a building's structure or systems cannot be said to "adversely impact" such structure or systems. Renovations are generally undertaken to improve the condition of a building or its systems. Thus, to accept the Careys' interpretation would effectively remove all renovations from the requirement of oversight by a licensed design professional and defeat the purpose of the Act. For purposes of construction, a rule or order of an administrative agency is treated like a statute.[20] In construing a statute, we look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served. A court must then reasonably or liberally construe the statute to achieve the statute's purpose, rather than construing it in a manner that defeats the statutory purpose.[21] We therefore interpret the phrase "adversely impact" as including the replacement of a building's structure or systems.

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[19] See 110 Neb. Admin. Code, ch. 10, § 10.4.1.2.

[20] *Utelcom, Inc. v. Egr*, 264 Neb. 1004, 653 N.W.2d 846 (2002).

[21] *Blakely, supra* note 9.

Here again, the appeals board had sufficient evidence to reasonably support its conclusion that the renovation failed to qualify under § 10.4.1.2. The evidence that the building's plumbing and electrical systems were to be replaced reasonably supported the conclusion that the building's mechanical and electrical systems would be adversely affected. The installation of fire-rated doors at the entrance of each apartment unit and corridor similarly provided reasonable support for the conclusion that the means of egress would be adversely affected. Thus, the evidence reasonably supported the appeals board's decision.

We conclude that the evidence before the appeals board reasonably supported the determination that the applicable building code required the Careys' submitted plans to be approved by a licensed design professional. Because we find that the appeals board acted within its jurisdiction and upon sufficient relevant evidence, we reverse the court's order overruling the permit's denial.

Order to Issue Building Permit

[10] Because we conclude that the appeals board acted within its jurisdiction and upon sufficient relevant evidence, we need not consider whether the court acted within its authority in ordering the city to issue a building permit without the requirement of a licensed architect's involvement. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[22]

CONCLUSION

We reverse the district court's order overruling the permit's denial based upon our conclusion that the appeals board acted within its jurisdiction and upon sufficient relevant evidence in affirming the denial of the building permit. Notwithstanding the state board's recommendation, the appeals board was presented with sufficient evidence to conclude that the Careys'

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[22] *Holdsworth v. Greenwood Farmers Co-op*, 286 Neb. 49, 835 N.W.2d 30 (2013).

renovation was not exempt from the Act and that a licensed architect was required to approve the submitted construction plans under the applicable building code. We therefore reverse the court's order and so need not consider the appropriateness of the granted relief.

REVERSED.

WRIGHT, J., participating on briefs.
CONNOLLY and STEPHAN, JJ., not participating.

JUSTIN S. FURSTENFELD, APPELLANT, V.
LISA B. PEPIN, APPELLEE.
840 N.W.2d 862

Filed December 13, 2013. No. S-13-122.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.
3. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the tribunal from which the appeal is taken.
4. **Final Orders: Appeal and Error.** The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.
5. **Actions: Statutes.** "Special proceedings" include civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes.
6. **Actions: Modification of Decree: Child Custody.** Proceedings regarding modification of a marital dissolution, which are controlled by Neb. Rev. Stat. § 42-364 (Cum. Supp. 2012), are special proceedings, as are custody determinations, which are also controlled by § 42-364.
7. **Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.
8. **Final Orders: Appeal and Error.** A substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense

that was available to an appellant prior to the order from which an appeal is taken.

9. **Pretrial Procedure: Final Orders: Appeal and Error.** Discovery orders are not generally subject to interlocutory appeal because the underlying litigation is ongoing and the discovery order is not considered final. However, if the discovery order affects a substantial right and was made in a special proceeding, it is appealable.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Appeal dismissed.

Matt Catlett for appellant.

Terrance A. Poppe and Benjamin D. Kramer, of Morrow, Poppe, Watermeier & Lonowski, P.C., L.L.O., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

STEPHAN, J.

In a proceeding commenced by Lisa B. Pepin to modify the child custody and support provisions of a decree of dissolution, the district court for Lancaster County ordered Pepin's former spouse, Justin S. Furstenfeld, to obtain certain medical records from two health care providers located outside Nebraska. The records were eventually to be provided to Pepin. Furstenfeld appeals from that order. We conclude that the order does not affect a substantial right and is therefore not a final, appealable order.

BACKGROUND

In her amended complaint for modification of the dissolution decree, Pepin alleged that there had been material changes in circumstances involving Furstenfeld's "emotional and mental condition" and his "lifestyle and living arrangements" which required a modification or suspension of his parenting time with the couple's minor child. She also alleged there had been changes in Furstenfeld's financial circumstances which necessitated a modification of child support. Furstenfeld filed an answer generally denying these allegations. He also filed a counterclaim alleging Pepin had interfered with his exercise of

his parenting time and relationship with the child, and requesting that sole custody be awarded to him. In his counterclaim, Furstenfeld stated that he resided in Texas. Furstenfeld later voluntarily dismissed the counterclaim.

During the pendency of the modification proceeding, Pepin filed a "Motion for Order Releasing Medical Records." The motion stated that Furstenfeld had consented in a deposition to Pepin's review of his medical records but then refused to sign releases which would enable Pepin to obtain his treatment records from health care providers located in Texas and Tennessee. Pepin alleged that the records were "necessary for the upcoming trial on parenting time" and that the health care providers would not release the records without a court order or an authorization signed by Furstenfeld.

After conducting a hearing on the motion, the court entered an order finding that Pepin had become aware of the medical records "in the course of discovery," that she had requested production of the records by Furstenfeld, and that he had responded by stating that he had no such records in his possession or control. The court also found that because the two health care providers were beyond its jurisdiction, there was no mechanism for Pepin to obtain the records other than through "suitable waivers and/or releases" executed by Furstenfeld. The court ordered Furstenfeld to execute the documents necessary to obtain the records from the facilities and to have the records delivered to his attorney, who was then required to review them and either provide copies to Pepin or file an appropriate objection with the court. The court also ordered both parties and their attorneys not to publicly disclose any information contained in such records, other than through an offer as evidence at trial.

Furstenfeld perfected a timely appeal from this order, which we moved to our docket on our own motion pursuant to our authority to regulate the caseloads of the appellate courts of this state.[1]

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[1] See, Neb. Rev. Stat. § 24-1106(3) (Reissue 2008); Neb. Ct. R. App. P. § 2-102(C) (rev. 2012).

ASSIGNMENT OF ERROR

Furstenfeld contends, restated, that the district court had no authority to order him to obtain the records from the health care providers for eventual production to Pepin and therefore erred in doing so.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.[2]

ANALYSIS

[2] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.[3] We therefore consider the threshold question of whether the order challenged by Furstenfeld is a final, appealable order over which we may exercise appellate jurisdiction.

[3,4] For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the tribunal from which the appeal is taken.[4] The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.[5] The order in this matter did not determine the action and prevent a judgment, and it was not made on summary application in an action after judgment was rendered. We therefore focus our inquiry on whether it affected a substantial right and was made during a special proceeding.

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[2] *Steven S. v. Mary S.*, 277 Neb. 124, 760 N.W.2d 28 (2009).

[3] *Sutton v. Killham*, 285 Neb. 1, 825 N.W.2d 188 (2013).

[4] *Steve S. v. Mary S.*, *supra* note 2.

[5] *Id.*

[5,6] "Special proceedings" include civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes.[6] Proceedings regarding modification of a marital dissolution, which are controlled by Neb. Rev. Stat. § 42-364 (Supp. 2013), are special proceedings, as are custody determinations, which are also controlled by § 42-364.[7] Thus, the order from which Furstenfeld appeals was entered in a special proceeding.

[7-9] A substantial right is an essential legal right, not a mere technical right.[8] A substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant prior to the order from which an appeal is taken.[9] Here, although the order at issue does not cite to any specific provision of the Nebraska Court Rules of Discovery in Civil Cases,[10] it is clear that it was entered in response to a dispute which arose in the course of pretrial discovery. The order recites that Furstenfeld's treatment at the two out-of-state facilities became known "in the course of discovery" and that Pepin had served a request for production of the medical records, to which Furstenfeld had responded that the records were not in his possession or control. This reflects the general procedure set forth in § 6-334 of the discovery rules for obtaining discovery in the form of documents from an opposing party. Where, as here, this procedure does not result in the requested production, the requesting party may seek an order of the court to compel discovery pursuant to § 6-337. Although the district court did not cite this rule as authority for its order, we conclude that it can be fairly characterized as an order compelling discovery. Discovery orders are not generally subject to interlocutory appeal because the underlying litigation is ongoing and the discovery order is

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[6] See *id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] Neb. Ct. R. Disc. §§ 6-301 to 6-337.

not considered final.[11] However, if the discovery order affects a substantial right and was made in a special proceeding, it is appealable.[12]

In two cases involving contested issues of parental fitness for custody, we held that discovery orders did not affect a parent's substantial right and were therefore not appealable. In *In re Guardianship of Sophia M.*,[13] grandparents seeking appointment as guardians of their maternal granddaughter obtained an order requiring the mother of the child to undergo a mental examination. Although we concluded that the guardianship proceeding constituted a special proceeding, we held that the discovery order did not affect the mother's substantial rights because it did not diminish her ability to contest any adverse results or present evidence of her own fitness to have custody of the child. We further noted:

> Although a mental examination, once ordered and performed, cannot be undone, we are not convinced that any harm caused by waiting to appeal the order until after final judgment is sufficient to warrant an interlocutory appeal. In contrast, allowing an interlocutory appeal in this case promotes significant delay in the guardianship proceedings and the ultimate resolution of [the minor child's] custody.[14]

We applied the same reasoning in *Steven S. v. Mary S.*,[15] a proceeding to modify the child custody provisions of a decree of dissolution. We held that an order requiring the mother to undergo a psychological examination requested by the father to determine her parental fitness did not affect the mother's substantial rights and was therefore not appealable. And we noted that "if warranted, an egregious error made by the court

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[11] *Steven S. v. Mary S.*, *supra* note 2; *In re Guardianship of Sophia M.*, 271 Neb. 133, 710 N.W.2d 312 (2006).

[12] *Id.*

[13] *In re Guardianship of Sophia M.*, *supra* note 11.

[14] *Id.* at 138, 710 N.W.2d at 317.

[15] *Steven S. v. Mary S.*, *supra* note 2.

in ordering a mental examination could be challenged by the aggrieved party in a mandamus action."[16]

Also instructive on this issue is *Schropp Indus. v. Washington Cty. Atty.'s Ofc.*,[17] an appeal from an order in an ancillary discovery proceeding which required a party to produce certain documents. We held that neither the final order statute nor the collateral order doctrine provided a basis for appellate jurisdiction. Assuming without deciding that an ancillary discovery proceeding was a special proceeding, we concluded that the discovery order did not affect a substantial right because any error could be "effectively vindicated in an appeal from the final judgment."[18]

Applying these principles, we conclude that the order requiring Furstenfeld to obtain and produce the medical records did not affect his substantial rights. The order does not impair his ability to assert a privilege or object to the admissibility of the records at trial. His claim that the court exceeded its authority in ordering him to sign the authorizations necessary to obtain the records can be preserved for resolution in any appeal from the final judgment on the application for modification of custody and child support. And we note that the order specifically requires that the records, once obtained, may be used by the parties solely as evidence in this case. The order does not affect a substantial right, and it is therefore not appealable.

CONCLUSION

For the reasons discussed, there is no final, appealable order before us, and we therefore lack appellate jurisdiction. Accordingly, we dismiss the appeal.

APPEAL DISMISSED.

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[16] *Id.* at 132, 760 N.W.2d at 35.

[17] *Schropp Indus. v. Washington Cty. Atty.'s Ofc.*, 281 Neb. 152, 794 N.W.2d 685 (2011).

[18] *Id.* at 159, 794 N.W.2d at 692.

HAROLD WARP PIONEER VILLAGE FOUNDATION, APPELLANT, v. DOUG EWALD, TAX COMMISSIONER, ET AL., APPELLEES.

844 N.W.2d 245

Filed December 13, 2013. Nos. S-13-129, S-13-165.

1. **Taxation: Judgments: Appeal and Error.** Appellate courts review decisions rendered by the Tax Equalization and Review Commission for errors appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Taxation: Appeal and Error.** An appellate court reviews questions of law arising during appellate review of decisions by the Tax Equalization and Review Commission de novo on the record.

Appeals from the Tax Equalization and Review Commission. Reversed and remanded with directions.

Daniel L. Aschwege, of Knapp, Fangmeyer, Aschwege, Besse & Marsh, P.C., for appellant.

Jon Bruning, Attorney General, and Jonathan D. Cannon, Special Assistant Attorney General, for appellees Doug Ewald and Ruth Sorensen.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

STEPHAN, J.

The Harold Warp Pioneer Village Foundation (Foundation) owns and operates the Pioneer Village Museum in Minden, Nebraska. The Foundation also owns and operates a nearby motel and campground; both are used primarily by museum visitors. For many years, the museum, the motel, and the campground have all been granted property tax exemptions. When the Kearney County Board of Equalization granted the exemptions for 2011, state tax officials appealed to the Nebraska Tax Equalization and Review Commission (TERC), contending the motel and campground were not entitled to exemptions. TERC agreed, and the Foundation has appealed from those

determinations. We conclude that the motel and campground are beneficial to the museum and reasonably necessary to further its educational mission and are therefore entitled to property tax exemptions.

BACKGROUND

The Foundation is a Nebraska nonprofit corporation which owns and operates the museum. The museum is an educational institution designed to preserve history and technology for future generations. The museum displays approximately 50,000 exhibits in 28 buildings on 20 acres of land. A museum patron wishing to view every exhibit offered would need to visit the museum every day for more than 1 week. Approximately 30 percent of museum patrons spend more than 1 day viewing the exhibits.

The Foundation also owns and operates an 88-room motel and a campground located near the museum. The campground offers sites for recreational vehicles and tents. The motel and campground are open to the public, but their primary purpose is to lodge patrons of the museum. Of the 17,072 guests of the motel and campground in 2010, only 4.2 percent did not attend the museum. There are no other lodging facilities in Minden or Kearney County suitable to accommodate museum patrons. The closest campground is 12 miles away, and the closest motel is approximately 20 miles away. Without the revenue generated by the motel and campground, the museum would not have sufficient funds to continue its operations.

The Foundation applied for and was granted property tax exemptions for the museum, the motel, and the campground every year from 1984 to 2010. In 2011, the Foundation again applied for these property tax exemptions. The county assessor recommended an exemption be granted for the museum but denied exemptions for the motel and campground. However, the board granted all three exemptions.

Doug Ewald, the Nebraska Tax Commissioner, and Ruth Sorensen, the Nebraska Property Tax Administrator, perfected appeals to TERC. One appeal challenged the exemptions for the motel, and another appeal challenged the exemption for the campground. TERC conducted a consolidated hearing and

ultimately determined that because the motel and campground were not used exclusively for educational purposes, neither was entitled to tax exemptions under Nebraska law.[1] The Foundation filed timely appeals, which we consolidated for briefing and oral argument.

ASSIGNMENTS OF ERROR

The Foundation assigns that TERC erred in finding that (1) the motel and campground were not used exclusively for educational purposes, (2) competent evidence was presented to rebut the presumption that the board faithfully performed its duties and had sufficient competent evidence to make its determinations, and (3) the board's decision was arbitrary or unreasonable.

STANDARD OF REVIEW

[1,2] Appellate courts review decisions rendered by TERC for errors appearing on the record.[2] When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[3]

[3] An appellate court reviews questions of law arising during appellate review of decisions by TERC de novo on the record.[4]

ANALYSIS

The property tax exemption at issue in these cases is governed by § 77-202. With certain exceptions not applicable to this case, the statute provides that property in Nebraska

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[1] See Neb. Rev. Stat. § 77-202(1)(d) (Supp. 2011).

[2] Neb. Rev. Stat. § 77-5019(5) (Cum. Supp. 2010); *Krings v. Garfield Cty. Bd. of Equal.*, 286 Neb. 352, 835 N.W.2d 750 (2013). See *Bethesda Found. v. Buffalo Cty. Bd. of Equal.*, 263 Neb. 454, 640 N.W.2d 398 (2002).

[3] *Lozier Corp. v. Douglas Cty. Bd. of Equal.*, 285 Neb. 705, 829 N.W.2d 652 (2013); *Schuyler Apt. Partners v. Colfax Cty. Bd. of Equal.*, 279 Neb. 989, 783 N.W.2d 587 (2010).

[4] *Lozier Corp. v. Douglas Cty. Bd. of Equal.*, *supra* note 3.

"owned by" an educational organization "for the exclusive benefit" of that organization is exempt from property tax if it is "used exclusively for educational" purposes.[5] An educational organization includes "a museum or historical society operated exclusively for the benefit and education of the public."[6] "Exclusive use" means the predominant or primary use of the property as opposed to incidental use.[7]

The relevant facts summarized above are not in dispute. The parties agree that the museum is operated exclusively for educational purposes. They also agree that the primary purpose of both the motel and the campground is to provide lodging for museum patrons. But the parties disagree as to whether the motel and campground are "used exclusively" for educational purposes so as to be entitled to property tax exemptions.

The Foundation argues that because approximately 95 percent of the motel and campground guests are museum patrons, the motel and campground are used exclusively to further the educational purposes of the museum. In essence, the Foundation concedes that the motel and campground are not educational in and of themselves. But it argues that they should be considered to be used for educational purposes because they are beneficial to the museum and reasonably necessary to support its operation, which is an educational purpose. In other words, the Foundation asks us to view the entire global structure of its operation as one integrated body that exclusively promotes educational purposes.

On the other hand, the Tax Commissioner and the Property Tax Administrator ask us to focus more narrowly on the use of the motel and campground. They contend that because these facilities are used only for lodging, which itself is not an educational use, any incidental benefit they may have to the museum is not sufficient to exempt them from property taxation.

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[5] § 77-202(1)(d).

[6] § 77-202(1)(d)(B).

[7] See, 350 Neb. Admin. Code, ch. 40, § 005.03 (2013); *Fort Calhoun Bapt. Ch. v. Washington Cty. Bd. of Eq.*, 277 Neb. 25, 759 N.W.2d 475 (2009); *Bethesda Found. v. Buffalo Cty. Bd. of Equal.*, *supra* note 2.

TERC concluded on the basis of the undisputed facts that the Foundation was not entitled to exemptions for the motel and campground. Under our standard of review, we must decide whether this determination "conforms to the law."[8] In the context of this case, we regard this as a question of law which we review de novo on the record.[9]

TERC found our 1961 decision in *Doane College v. County of Saline*[10] to be "controlling." In that case, Doane College applied for tax-exempt status for two separate facilities located on its campus. One was a residence reserved for the college president, and the other was an apartment complex located on campus and provided for the exclusive use of new faculty. The county board determined that neither property was tax exempt. Doane College appealed to the district court—this was prior to the existence of TERC—and that court determined that the president's residence was exempt but the faculty apartments were not.

Doane College then appealed to this court. We affirmed the judgment of the district court. In doing so, we found various factors supporting the exemption for the president's residence, including that the president was required to live in the residence; that the residence was used as a reception area for faculty, foreign visitors, and trustees; and that the residence was used for various student gatherings. We also noted that one room of the residence was used as the president's library and office. We held that this evidence demonstrated that the residence was used exclusively for educational purposes, because the primary or dominant use of the property was for education, and that thus, the president's residence was exempt from property taxation.

We concluded that the faculty apartments were not exempt, reasoning they were located on the main campus and were rented at fair market value to new faculty who were permitted but not required to reside there. We noted that more than

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[8] *Lozier Corp. v. Douglas Cty. Bd. of Equal.*, *supra* note 3; *Schuyler Apt. Partners v. Colfax Cty. Bd. of Equal.*, *supra* note 3.

[9] *Id.*

[10] *Doane College v. County of Saline*, 173 Neb. 8, 112 N.W.2d 248 (1961).

two-thirds of the faculty resided elsewhere. And we reasoned that although faculty residing in the apartments sometimes met with students there, any educational use of the faculty apartments was remote, and that their primary or dominant use was not for educational purposes. We also specifically noted that the apartments were in direct competition with privately owned property for renters.

As in *Doane College*, the issue in this case is not whether the Foundation uses its property for an educational purpose, but, rather, how much of its property is used for that purpose. Two cases decided by this court after *Doane College* provide the proper analytical framework for resolving this issue. *Lariat Boys Ranch v. Board of Equalization*[11] involved a contiguous 1,000-acre tract owned by a nonprofit corporation which operated it as a "ranch home" for "indigent and wayward boys." The property owner contended that the entire tract was used for this purpose and was therefore exempt. The county, on the other hand, contended that the exemption should be limited to the 5 acres on which the boys' residences and school building were located. The county argued that the remaining land, most of which was used for grazing and farming, should not be exempt. We held that the entire tract was exempt because it was reasonably needed to promote the nonprofit's educational goals and was not excessive for that purpose. We noted that the determination of which facilities were reasonably necessary to carry out the educational goals of an entity should be undertaken on a case-by-case basis.

We again addressed the issue of whether specific property should be included within an exemption granted to a nonprofit corporation in *Immanuel, Inc. v. Board of Equal*.[12] In that case, it was undisputed that the property owner was entitled to tax exemptions for its hospital and hospital grounds because they were used for charitable purposes. The hospital built a childcare facility on its campus for the exclusive use of its employees in order to promote recruitment and retention of

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[11] *Lariat Boys Ranch v. Board of Equalization*, 181 Neb. 198, 199, 147 N.W.2d 515, 516 (1966).

[12] *Immanuel, Inc. v. Board of Equal.*, 222 Neb. 405, 384 N.W.2d 266 (1986).

professional employees. The hospital appealed from a denial of its application for tax exemption for the childcare facility. This court determined the childcare facility was entitled to the requested exemption. Distinguishing *Doane College*, upon which the county relied, we held that the childcare facility directly benefited the hospital by alleviating staffing problems and thus aided the primary nursing care to patients, and was therefore "reasonably necessary for the operation of the hospital."[13]

Based upon the reasoning of *Lariat Boys Ranch* and *Immanuel, Inc.*, it is clear that our inquiry in this case cannot be narrowly focused on whether the overnight lodging provided by the Foundation's motel and campground is an educational purpose, as the Tax Commissioner and Property Tax Administrator contend. Rather, we must undertake a broader examination of whether those lodging facilities are reasonably necessary to the educational mission of the Foundation's museum, based upon the specific facts presented here.

The record reflects that the museum is unusual if not unique because of the combination of two factors. First, the museum houses an extensive public collection which cannot be viewed in a single day, thus creating a demand for convenient, nearby lodging for those visitors who wish to spend more than 1 day viewing the museum's exhibits. Second, the museum is situated in a relatively small community which has no public lodging facilities other than those offered by the Foundation.

The Tax Commissioner and Property Tax Administrator concede in their brief that the primary purpose of the Foundation's motel and campground "is to lodge patrons of the Museum."[14] The record reflects that the properties are being used predominantly for that purpose. Although the motel and campground are open to the public, they are utilized primarily by visitors to the museum. In each of the years from 1990 through 2010, at least 95.5 percent of the persons who stayed at the motel and campground were museum visitors. A significant majority

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[13] *Id.* at 411, 384 N.W.2d at 270.

[14] Brief for appellees at 6.

of these were persons who did not reside in Nebraska. In 2010, all of the campground guests and 99.9 percent of the motel guests were from outside Kearney County. It was estimated that 30 percent of these museum visitors viewed exhibits for more than 1 day; those who did and wished to stay overnight in Minden had to utilize the Foundation's motel or campground.

The record includes a letter from the Internal Revenue Service dated August 18, 1983, granting the Foundation's request for exemption from federal income tax under § 501(c)(3) of the Internal Revenue Code. Although this document is not controlling on any of the issues in this case, it is instructive in its characterization of the relationship between the Foundation's museum, motel, and campground. In determining that the motel and campground were not an "unrelated trade or business" that would be subject to income tax notwithstanding the fact that they are owned by an exempt entity, the Internal Revenue Service stated:

> Your operation of the . . . motel [and] campground . . . is for the purpose of enabling your visitors to remain long enough to take in the full extent of your educational exhibits, the purpose of your exemption. Because there are not facilities of this type within a reasonable proximity to your exhibit, the time a visitor could or would spend would be sharply curtailed, i.e., to approximately half a day, yet it takes a full day or more to appreciate all your historical and educational presentations. *Making it possible for visitors to get a full measure of the educational aspects is substantially related to the accomplishment of your exempt purposes*.

(Emphasis supplied.) Although this characterization of the relationship of the museum and the Foundation's lodging facilities was made more than 30 years ago, it reflects the relationship that existed in 2011 as reflected in the record in these cases.

On the basis of that record, we conclude that TERC erred in determining that the Foundation was not entitled to exemptions for its motel and campground properties. The issue is not whether "lodging" is an educational use in an abstract

sense, but, rather, whether these specific lodging facilities were reasonably necessary to accomplish the educational purpose of the Foundation in the operation of its museum. Just as the grazing and farming lands were reasonably necessary to the charitable and educational purposes of the boys' ranch in *Lariat Boys Ranch* and the childcare facility was reasonably necessary to accomplish the charitable purposes of the hospital in *Immanuel, Inc.*, the operation of the motel and campground by the Foundation is reasonably necessary to the accomplishment of its educational mission.

Because we conclude that TERC erred as a matter of law in vacating and reversing the decisions of the board, we need not consider the Foundation's remaining assignments of error.

CONCLUSION

For the reasons discussed, we reverse TERC's decisions which vacated and reversed the decisions of the board, and we remand each cause to TERC with directions to affirm the board's decision granting property tax exemptions to the Foundation for its motel and campground properties for the tax year 2011.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE INTEREST OF DANAISHA W. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. DENNISCA W., APPELLANT.

840 N.W.2d 533

Filed December 13, 2013. No. S-13-218.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
3. **Juvenile Courts: Jurisdiction: Appeal and Error.** In a juvenile case, as in any other appeal, before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.

4. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken.
5. **Final Orders: Appeal and Error.** Among the three types of final orders which may be reviewed on appeal is an order that affects a substantial right made during a special proceeding.
6. **Juvenile Courts: Appeal and Error.** A proceeding before a juvenile court is a special proceeding for appellate purposes.
7. **Child Custody: Visitation: Final Orders: Appeal and Error.** Orders which temporarily suspend a parent's custody and visitation rights do not affect a substantial right and are therefore not appealable.
8. **Juvenile Courts: Parental Rights: Parent and Child: Time: Final Orders.** Whether a substantial right of a parent has been affected by an order in juvenile court litigation is dependent upon both the object of the order and the length of time over which the parent's relationship with the juvenile may reasonably be expected to be disturbed.

Appeal from the Separate Juvenile Court of Lancaster County: LINDA S. PORTER, Judge. Appeal dismissed.

Hazell G. Rodriguez, of Legal Aid of Nebraska, for appellant.

Joe Kelly, Lancaster County Attorney, and Carolyn C. Bosn for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

STEPHAN, J.

Dennisca W. is the mother of six minor children who are the subject of a juvenile proceeding pending in the separate juvenile court of Lancaster County. She appeals from an order of that court, contending that its provisions with respect to visitation amount to an improper delegation of the juvenile court's authority to the Department of Health and Human Services (DHHS). The State contends that the order is not appealable. We agree with the State and therefore dismiss the appeal for lack of jurisdiction.

BACKGROUND

Of the six children involved in this case, the oldest child was born in 2004 and the youngest children, twins, were born in 2010. Insofar as we can determine from the record,

the children's fathers have not been made parties to the juvenile proceedings.

This juvenile proceeding began in March 2011, when an order for temporary custody was entered based on reports of domestic abuse and after Dennisca left her infant unattended while seeking medical treatment for one of her other children. The children were adjudicated on May 12, 2011, after Dennisca entered a plea of no contest. The juvenile court made findings that the children were at risk of harm due to domestic violence in the home. It also found that after the twins' birth, meconium test results for one of the twins showed the presence of marijuana.

The children were originally placed with their maternal grandmother. Dennisca was permitted to live in the same home, and the children were returned to her custody in January 2012, with a requirement that she and the children continue to reside with the grandmother. It was subsequently discovered that Dennisca and the children were frequently staying with other family members, and the children were again removed from her custody and were placed in foster homes.

The juvenile court conducted a review hearing on October 29, 2012, and entered a dispositional order on November 1. In that order, the court found that reasonable efforts had been made to return legal custody of the children to Dennisca, but that doing so would be contrary to the welfare of the children due to Dennisca's "lack of appropriate behaviors in interactions with her children and others"; her "relapse in the use of controlled substances and failure to successfully complete substance abuse treatment"; and her "failure to date to demonstrate a safe, stable, and drug-free and violence-free environment for her children." The court further found that "the health and safety of the minor children require said children's continued removal from the family home" and that it was "in the children's best interests and welfare that they remain in out-of-home placements at this time."

The court overruled Dennisca's request to place the children back with their maternal grandmother. The court ordered Dennisca to establish a safe and stable home and a legal means of support for herself and her children, to abstain from alcohol

and nonprescribed controlled substances, and to participate in individual therapy sessions "to address anger management, healthy interpersonal relationships, social skills, including working cooperatively with others involved in her children's lives, and abstinence from controlled substances." The order also provided: "Visitation/parenting time between [Dennisca] and the minor children is temporarily suspended at this time." There was no appeal from this order.

On December 6, 2012, the State filed a motion for termination of parental rights. The case came before the court on December 18 for a hearing on Dennisca's motion to reinstate visitation rights, which the court overruled after receiving evidence. After providing Dennisca with a copy of the motion to terminate parental rights, the court scheduled an adjudication hearing on the motion for January 29, 2013. There was no appeal from this order.

At the January 29, 2013, hearing, the court advised Dennisca of her rights with respect to the motion to terminate her parental rights and received her plea of "denial." After stating that it would conduct a formal hearing on the motion to terminate parental rights on March 21, the court accepted Dennisca's request to conduct a review hearing on the issue of visitation. The court thereafter received evidence on the visitation issue, including a court report submitted by DHHS, a report of the guardian ad litem, documents compiled by KVC Behavioral Healthcare regarding care plans for the children, and a report from the Nebraska Foster Care Review Office. Dennisca testified at the hearing, as did the DHHS caseworker assigned to the case.

In an order entered on February 11, 2013, the juvenile court found that services had been provided in compliance with the case plan and that Dennisca had made no sustained progress to alleviate the causes of the adjudication and the children's out-of-home placements. The court ordered that the children remain in the temporary custody of DHHS for placement, treatment, and care, and further ordered that DHHS could not change the foster placements without prior court approval. The court ended its temporary suspension of Dennisca's visitation rights, but imposed specific conditions upon such visitation. It

ordered that Dennisca could have visitation with each of the children at a location selected by DHHS, fully supervised by a therapist, DHHS caseworker, or family support worker who is familiar with the child. Visitation with each of the children was to be separate. The order further provided that Dennisca could be required to meet with any therapist who was supervising a visit prior to the visit to "go over ground rules and suggestions." She was also directed not to discuss with the children the pending termination proceeding or the children's placement. In addition, no other persons were to be present during the visitation except Dennisca and the individual designated by DHHS to supervise the visit. The order provided: "If [Dennisca] is unwilling to abide by any ground rules and the restrictions as to the visitation as set forth herein, visitation with that child or those children shall remain suspended pending further hearing before this Court."

On March 5, 2013, Dennisca filed a motion to compel, asking the court to enter an order directing DHHS to immediately schedule visitation based on the February 11 order. The motion stated that Dennisca's counsel had encountered difficulty in making arrangements with DHHS for the visits ordered by the court. On March 8, 3 days after filing the motion to compel, and before any disposition by the juvenile court, Dennisca filed a notice of appeal from the February 11 order.

While the appeal was pending before the Nebraska Court of Appeals, the State filed a motion for summary dismissal pursuant to Neb. Ct. R. App. P. § 2-107(B)(1) (rev. 2012), contending that there was no final, appealable order. The Court of Appeals denied the motion. We subsequently moved the case to our docket on our own motion, pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[1]

ASSIGNMENTS OF ERROR

Dennisca contends that the juvenile court erred in (1) delegating its authority to DHHS and therapists to determine and

[1] See, Neb. Rev. Stat. § 24-1106(3) (Reissue 2008); Neb. Ct. R. App. P. § 2-102(C) (rev. 2012).

enforce their own conditions for visitation; (2) determining that visitation with the children should be separate, contrary to the best interests of the children and despite Dennisca's progress and improvement; and (3) creating a conditional order, which Dennisca contends is unreasonable and void.

STANDARD OF REVIEW

[1,2] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.[2] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.[3]

ANALYSIS

[3-6] The State reasserts its argument that we lack appellate jurisdiction because there was no final, appealable order by the juvenile court. In a juvenile case, as in any other appeal, before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[4] For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken.[5] Among the three types of final orders which may be reviewed on appeal is an order that affects a substantial right made during a special proceeding.[6] A proceeding before a juvenile court is a special proceeding for appellate purposes.[7] Therefore, we must consider whether the order of the juvenile court which imposed conditions and restrictions upon Dennisca's visitation with her children affected a substantial right.

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[2] *In re Interest of Edward B.*, 285 Neb. 556, 827 N.W.2d 805 (2013); *In re Interest of Kendra M. et al.*, 283 Neb. 1014, 814 N.W.2d 747 (2012).

[3] *In re Adoption of Amea R.*, 282 Neb. 751, 807 N.W.2d 736 (2011); *In re Interest of Jamyia M.*, 281 Neb. 964, 800 N.W.2d 259 (2011).

[4] *In re Interest of Meridian H.*, 281 Neb. 465, 798 N.W.2d 96 (2011); *In re Interest of Taylor W.*, 276 Neb. 679, 757 N.W.2d 1 (2008).

[5] *Selma Development v. Great Western Bank*, 285 Neb. 37, 825 N.W.2d 215 (2013).

[6] See *id.*

[7] *In re Interest of Jamyia M., supra* note 3.

[7] We have held that where an order from a juvenile court is already in place and a subsequent order merely extends the time for which the previous order is applicable, the subsequent order by itself does not affect a substantial right and does not extend the time in which the original order may be appealed.[8] The State contends that this rule applies here because the juvenile court's order of February 11, 2013, imposing conditions on Dennisca's visitation rights, was merely a continuation of its order of November 1, 2012, suspending those rights, from which Dennisca did not appeal. But the State's position is incorrect because the November 1 order explicitly stated that Dennisca's visitation and parenting time were "temporarily suspended." Orders which temporarily suspend a parent's custody and visitation rights do not affect a substantial right and are therefore not appealable.[9]

[8] However, we find the February 11, 2013, order was not a final order for a different reason. Whether a substantial right of a parent has been affected by an order in juvenile court litigation is dependent upon both the object of the order and the length of time over which the parent's relationship with the juvenile may reasonably be expected to be disturbed.[10] Although the February 11 order was not specifically designated as "temporary" in nature, it was effectively so, because on the same date, the court scheduled the hearing on the State's motion to terminate parental rights for March 21. Borrowing from our final order jurisprudence in juvenile cases, we held in *In re Guardianship of Sophia M.*[11] that an order which denied a mother visitation with her child pending a final hearing on the custodial grandparents' petition for guardianship did not affect the mother's substantial right, because the hearing was scheduled for 3 weeks later. We reasoned that "since the order

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[8] *In re Guardianship of Rebecca B. et al.*, 260 Neb. 922, 621 N.W.2d 289 (2000).

[9] See, *Steven S. v. Mary S.*, 277 Neb. 124, 760 N.W.2d 28 (2009); *In re Guardianship of Sophia M.*, 271 Neb. 133, 710 N.W.2d 312 (2006).

[10] *In re Adoption of David C.*, 280 Neb. 719, 790 N.W.2d 205 (2010); *Steven S. v. Mary S.*, *supra* note 9.

[11] *In re Guardianship of Sophia M.*, *supra* note 9.

effectively denied visitation only until the final guardianship hearing, the length of time that [the mother's] relationship with [the child] was to be disturbed was brief, and the order was not a permanent disposition."[12]

Given the procedural posture of this case at the time the February 11, 2013, visitation order was entered, the order could be expected to affect Dennisca's relationship with her children only until such time as the juvenile court ruled on the State's motion to terminate her parental rights. It is that disposition which will determine whether the parental relationship will continue and, if so, under what conditions. Had this appeal not been taken, the resolution of the motion to terminate parental rights would likely have occurred within a few weeks after entry of the visitation order. As we noted in *In re Guardianship of Sophia M.*, the fact that an appeal has delayed final disposition "is unfortunate but irrelevant in our determination whether the order, when issued, affected a substantial right."[13]

We conclude that because the February 11, 2013, order related to visitation and was necessarily temporary in nature, it did not affect a substantial right and was not a final, appealable order. Accordingly, we dismiss the appeal for lack of jurisdiction.

CONCLUSION

For the reasons discussed, we find that this court lacks jurisdiction and that the appeal must be dismissed.

APPEAL DISMISSED.

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[12] *Id.* at 139, 710 N.W.2d at 317.

[13] *Id.*

IN RE INTEREST OF KODI L., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. MICHAEL L., APPELLANT.

840 N.W.2d 538

Filed December 13, 2013. No. S-13-242.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. **Paternity.** The proper legal effect of a signed, unchallenged acknowledgment of paternity is a finding that the individual who signed as the father is in fact the legal father.
3. ____. An acknowledgment of paternity can be challenged on the basis of fraud, duress, or material mistake of fact.
4. **Appeal and Error.** In order to be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
5. ____. Errors assigned but not argued will not be addressed on appeal.
6. ____. An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal.

Appeal from the County Court for Madison County: ROSS A. STOFFER, Judge. Affirmed.

Joel E. Carlson, of Stratton, DeLay, Doele, Carlson & Buettner, P.C., L.L.O., for appellant.

Gail E. Collins, Deputy Madison County Attorney, for appellee.

Bradley C. Easland, of Morland, Easland & Lohrberg, P.C., guardian ad litem.

WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

WRIGHT, J.

NATURE OF CASE

Michael L. appeals his exclusion and dismissal from the juvenile proceedings involving Kodi L. The juvenile court dismissed Michael because it found that the acknowledgment of paternity signed by him was fraudulent. Although Michael was not Kodi's biological father, he was named as Kodi's father

in the juvenile proceedings based upon the acknowledgment of paternity.

Under Neb. Rev. Stat. § 43-1409 (Reissue 2008), a notarized acknowledgment of paternity creates a rebuttable presumption of paternity that can be challenged only on the basis of fraud, duress, or material mistake of fact. In the instant case, the juvenile court found that the acknowledgment of paternity was fraudulent, because Michael knew when he signed it that he was not Kodi's biological father. Therefore, the presumption of paternity was rebutted, and the court dismissed Michael from the proceedings. We affirm.

SCOPE OF REVIEW

[1] We review juvenile cases de novo on the record and reach our conclusions independently of the juvenile court's findings. *In re Interest of Edward B.*, 285 Neb. 556, 827 N.W.2d 805 (2013).

FACTS

Shawntel H. gave birth to Kodi in August 2012. Shortly after Kodi's birth, Shawntel and Michael signed a sworn acknowledgment of paternity naming Michael as Kodi's biological father before a notary public. When they executed the acknowledgment of paternity, both Shawntel and Michael were aware that Michael was not Kodi's biological father. Despite this fact, they requested that the birth certificate name Michael as the father and that Kodi take Michael's last name. In the months following Kodi's birth, Michael lived with Shawntel and Kodi in an apartment.

On December 5, 2012, Kodi was removed from the home based on Shawntel's use and sale of methamphetamine. The State subsequently filed an amended juvenile petition alleging that Kodi was a child within Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). Shawntel admitted the allegations, and the county court for Madison County, sitting as a juvenile court, granted the petition for adjudication. It ordered that Kodi be placed in the custody of the Department of Health and Human Services. In the amended petition, Michael was identified as Kodi's father.

On February 15, 2013, Kodi's guardian ad litem moved to exclude Michael from the juvenile proceedings, challenging on the basis of fraud the acknowledgment of paternity signed by Michael. The guardian ad litem alleged that the acknowledgment was fraudulent because Shawntel and Michael signed it despite knowing that Michael was not Kodi's biological father.

On February 21, 2013, the juvenile court held a hearing on the motion to exclude. At this hearing, Michael was present and was acknowledged as "[t]he juvenile's father."

In support of the motion to exclude, the guardian ad litem presented testimony from Kari Kraenow, the Department of Health and Human Services caseworker assigned to the case. Following Kodi's removal from the home, Kraenow had talked with Shawntel and Michael about Kodi's paternity. Both Shawntel and Michael told Kraenow that Shawntel was already pregnant when they met, but that Shawntel did not want the biological father to be involved. Shawntel and Michael told Kraenow that Michael signed the acknowledgment of paternity because they both wanted him to be Kodi's father. According to Kraenow, Shawntel recognized that "Jack D." was Kodi's biological father, but she identified Michael as the "legal father." Kraenow also testified that both Shawntel and Michael admitted to knowing Michael was not Kodi's biological father when they signed the acknowledgment of paternity.

On cross-examination, Michael told a similar story regarding why he signed the acknowledgment of paternity. He admitted that he and Shawntel knew when they signed the acknowledgment that he was not Kodi's biological father. They signed it because they wanted Michael "to be the father." According to Michael, he and Shawntel "didn't want [the biological father] to being [sic] any part of . . . Kodi's life. And so [Michael] stepped up as a man to be the father of that child." Despite testifying that he did not read the acknowledgment before signing it, Michael stated that he knew the acknowledgment was "to clarify who the parents were." He would not admit that he knew the acknowledgment was false when he signed it, but seemed to believe that the biological father did not need

to be involved or did not have the right to be involved because the pregnancy was the result of an alleged rape. (Shawntel had never filed a complaint about the alleged rape or reported it to the authorities.)

Evidence was adduced that Michael was facing charges and possible incarceration for 13 felony counts. The guardian ad litem also offered into evidence a "DNA Test Report" showing that there was a 0-percent probability that Michael was Kodi's biological father.

At the conclusion of the hearing, the juvenile court found that the guardian ad litem had met its burden under § 43-1409 to rebut the presumption of paternity arising from the notarized acknowledgment of paternity. The court found that the acknowledgment was fraudulent because "both Shawntel . . . and Michael . . . admitted that at the time they signed said document they both knew that Michael . . . was not the biological father of Kodi." Because the presumption was rebutted, the court ruled that the acknowledgment was "of no force and effect at this point in time." Based on the DNA test results, the court found that "there is a zero percent chance that [Michael] is the biological father of Kodi." Therefore, it concluded that "there is nothing in the Juvenile Petition filed herein that applies to Michael . . . as he is not the biological father of Kodi . . . nor is he the step-parent to Kodi." Accordingly, the court granted the guardian ad litem's motion to exclude Michael and dismissed him from the proceedings.

Michael timely appeals. Pursuant to our statutory authority to regulate the dockets of the appellate courts of this state, we moved the case to our docket. See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

ASSIGNMENT OF ERROR

Michael assigns that the juvenile court erred in excluding him as a party to the proceedings.

ANALYSIS

[2,3] The juvenile court excluded Michael because it found that the presumption of paternity arising from the notarized acknowledgment of paternity had been successfully rebutted.

Our case law provides that "the proper legal effect of a signed, unchallenged acknowledgment of paternity is a finding that the individual who signed as the father is in fact the legal father." *Cesar C. v. Alicia L.*, 281 Neb. 979, 985, 800 N.W.2d 249, 254 (2011). However, an acknowledgment of paternity can be challenged "on the basis of fraud, duress, or material mistake of fact." § 43-1409. In the instant case, the juvenile court determined that the acknowledgment was fraudulent and, accordingly, set it aside as having no legal effect.

[4,5] Michael does not argue that it was error to set aside the acknowledgment as fraudulent. In order to be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error. *J.P. v. Millard Public Schools*, 285 Neb. 890, 830 N.W.2d 453 (2013). Errors assigned but not argued will not be addressed on appeal. *Peterson v. Ohio Casualty Group*, 272 Neb. 700, 724 N.W.2d 765 (2006). Therefore, because Michael does not argue that it was error to set aside the acknowledgment, we do not review the juvenile court's decision to set it aside.

[6] Michael argues that the juvenile court erred in excluding him from the proceedings because he "was an active physical custodian and caregiver of [Kodi]." Brief for appellant at 6. But he did not make that argument before the juvenile court. When announcing its ruling, the juvenile court emphasized multiple times that Michael was excluded only to the extent that he was not Kodi's legal father, as had been alleged in the amended petition. Michael then asked whether he might be allowed to participate on other grounds, and the juvenile court left open the possibility that he could participate based on "another legal theory" besides paternity. Despite that opportunity, the record does not reflect that Michael has made any motions in the juvenile court to intervene or be named as a party in Kodi's juvenile proceedings on the basis of any relationship besides paternity. "[A]n issue not presented to or passed on by the trial court is not appropriate for consideration on appeal." *Sherman T. v. Karyn N.*, 286 Neb. 468, 475, 837 N.W.2d 746, 753 (2013). Michael did not argue before the

juvenile court that he was Kodi's custodian. Therefore, we do not consider that argument on appeal.

In summary, Michael argues that he should be included as a party on grounds not presented to the juvenile court. Yet, he fails to challenge the juvenile court's key decision leading to his exclusion—the setting aside of the acknowledgment of paternity as fraudulent. As such, the only question properly before this court is whether the juvenile court erred in dismissing Michael from the proceedings after it had set aside the acknowledgment of paternity.

We find no error in this regard. Once the acknowledgment was set aside, Michael could no longer claim that he was Kodi's legal father. And the evidence before the juvenile court conclusively established that Michael was not Kodi's biological father. The acknowledgment was Michael's sole basis for claiming that he was Kodi's father. Therefore, once the acknowledgment was set aside, he had no interest in the juvenile proceedings as a father. The juvenile court did not err in excluding Michael, because he was neither the legal nor the biological father.

CONCLUSION

For the aforementioned reasons, we affirm the juvenile court's order dismissing Michael from the juvenile proceedings.

AFFIRMED.

HEAVICAN, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
GREGORY D. FESTER II, APPELLANT.
840 N.W.2d 543

Filed December 13, 2013. No. S-13-401.

1. **Effectiveness of Counsel: Appeal and Error.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. An appellate court reviews the district court's factual findings for clear error. Whether defense counsel's performance was deficient and whether the defendant was prejudiced by that performance are questions of law that the appellate court reviews independently of the district court's decision.

2. **Postconviction: Pleas: Waiver: Effectiveness of Counsel.** While normally a voluntary guilty plea waives all defenses to a criminal charge, in a postconviction proceeding brought by a defendant convicted because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.
3. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense in his or her case.
4. **Effectiveness of Counsel: Proof.** To show deficient performance, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.
5. **Effectiveness of Counsel: Pleas: Proof.** To show prejudice when the alleged ineffective assistance relates to the entry of a plea, the defendant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have entered the plea and would have insisted on going to trial.
6. **Effectiveness of Counsel: Proof.** The two prongs of the ineffective assistance test under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), deficient performance and prejudice, may be addressed in either order.
7. **Effectiveness of Counsel: Presumptions: Appeal and Error.** The entire ineffectiveness analysis is viewed with a strong presumption that counsel's actions were reasonable and that even if found unreasonable, the error justifies setting aside the judgment only if there was prejudice.

Appeal from the District Court for Cass County: RANDALL L. REHMEIER, Judge. Affirmed.

Michael Ziskey, of Fankhauser, Nelsen, Werts, Ziskey & Merwin, P.C., for appellant.

Jon Bruning, Attorney General, and Melissa R. Vincent for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

STEPHAN, J.

Pursuant to a plea agreement, Gregory D. Fester II pled guilty to two counts of second degree murder and one count of use of a weapon to commit a felony. He was sentenced to two terms of life imprisonment on the murder convictions and to a term of 10 to 20 years in prison on the weapon

conviction, the sentences to be served consecutively. On direct appeal, we rejected his claim that these sentences were excessive.[1] Fester then filed a motion for postconviction relief, which the district court denied after conducting an evidentiary hearing. Fester now appeals from that order. Finding no error, we affirm.

FACTS

Fester was originally charged with two counts of first degree murder and two counts of use of a weapon to commit a felony. The charges were based on the deaths of Wayne and Sharmon Stock in rural Murdock, Nebraska, on or about April 17, 2006. Counsel was appointed to represent Fester.

The State attempted to amend the original information to allege aggravating factors and make Fester eligible for the death penalty,[2] but his counsel successfully challenged the amendment, thus removing death as a possible penalty for Fester. The attorney's time records indicate that he or his firm spent approximately 285 hours preparing for trial. In this process, counsel learned that there was substantial evidence against Fester, including Fester's statements, DNA evidence, and the statements of Fester's codefendant, Jessica Reid.

Approximately 1 month prior to the date set for trial, Fester's attorney negotiated a plea agreement for him. Pursuant to the agreement, the charges were reduced to two counts of second degree murder and one count of use of a weapon to commit a felony. Counsel was prepared to try the case, but he thought the plea agreement was advantageous to Fester because second degree murder is punishable by 20 years to life in prison,[3] while the only possible sentence Fester could receive for first degree murder was life in prison.[4] Counsel hoped that by reaching the plea agreement, Fester, who was 19 years old when the crimes were committed, would be sentenced to a term of years, rather than life. In Nebraska, an offender sentenced to

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[1] *State v. Fester*, 274 Neb. 786, 743 N.W.2d 380 (2008).

[2] See Neb. Rev. Stat. § 29-1603 (Reissue 2008).

[3] See Neb. Rev. Stat. §§ 28-105 and 28-304 (Reissue 2008).

[4] See § 28-105 and Neb. Rev. Stat. § 28-303 (Reissue 2008).

a term of years is eligible for parole, but an offender subject to a life sentence is not unless the sentence is commuted to a term of years by the Nebraska Board of Pardons.[5]

The written plea agreement expressly states that the statutory penalty for second degree murder is a minimum of 20 years in prison and a maximum of life imprisonment. It further states: "The Court can impose any sentence within the statutory range and both parties are free to argue at [the] time of sentencing as to what sentence should be imposed. There is no agreement as to the sentence to be imposed." The plea agreement further states that Fester had adequate time to discuss his defenses and options with his counsel and that Fester understood the provisions of the agreement. It also contains a clause noting that the agreement "contains all of the promises, agreements, and understandings between the parties." Fester read the plea agreement, entered his initials at the bottom of each page of the agreement, and signed the agreement.

Prior to accepting Fester's pleas, the district court engaged in a lengthy colloquy with him which included an advisement of the possible statutory penalties for second degree murder. Fester informed the court that he understood the possible penalties. Fester further acknowledged that he had had ample opportunity to review the case with his attorney and that he agreed to the plea agreement and wanted to enter it. He further stated that he was satisfied with his attorney's services.

After accepting the guilty pleas, the district court sentenced Fester to life imprisonment on both convictions of second degree murder and to 10 to 20 years in prison on the weapon conviction, the sentences to run consecutively. The same attorney represented Fester on direct appeal, in which we affirmed his sentences.[6]

Fester then filed this postconviction action. His original motion asserted eight grounds. The district court granted him an evidentiary hearing on two grounds alleging ineffective assistance of counsel, and it denied relief with respect to the

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[5] See, Neb. Const. art. IV, § 13; Neb. Rev. Stat. § 83-1,110 (Reissue 2008); *Poindexter v. Houston*, 275 Neb. 863, 750 N.W.2d 688 (2008).

[6] *State v. Fester*, *supra* note 1.

remaining allegations. Fester did not appeal from that order, and that decision is therefore final and not the subject of this appeal.[7]

The district court then conducted an evidentiary hearing on Fester's allegations of ineffective assistance of counsel. Evidence received at the hearing included the plea agreement, the transcript of the hearing during which Fester's pleas were accepted, and the depositions of Fester and the attorney who represented him in the criminal prosecution and on direct appeal. After reviewing this evidence, the district court determined that Fester had failed to meet his burden of proving his pleas were the result of ineffective assistance of counsel, and therefore denied postconviction relief. Fester filed this timely appeal.

ASSIGNMENT OF ERROR

Fester's sole assignment of error is that the district court erred in finding that his guilty pleas were not the result of ineffective assistance of counsel.

STANDARD OF REVIEW

[1] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.[8] We review the district court's factual findings for clear error.[9] However, whether defense counsel's performance was deficient and whether the defendant was prejudiced by that performance are questions of law that we review independently of the district court's decision.[10]

ANALYSIS

[2] For the sake of completeness, we note that Fester's ineffective assistance of counsel claims are properly before us. His guilty pleas did not waive the claim; while normally a voluntary guilty plea waives all defenses to a criminal

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[7] See *State v. Timmens*, 282 Neb. 787, 805 N.W.2d 704 (2011).

[8] See *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012).

[9] See *id.*

[10] *Id.*

charge, in a postconviction proceeding brought by a defendant convicted because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.[11] And Fester's claims are not procedurally barred because he was represented by the same counsel at trial and on appeal, and thus postconviction is the proper forum to raise his ineffective assistance of trial counsel claims.[12]

[3-7] Certain general principles govern our consideration of Fester's claims. In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden, in accordance with *Strickland v. Washington*,[13] to show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense in his or her case.[14] To show deficient performance, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.[15] To show prejudice when the alleged ineffective assistance relates to the entry of a plea, the defendant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have entered the plea and would have insisted on going to trial.[16] The two prongs of this test, deficient performance and prejudice, may be addressed in either order.[17] The entire ineffectiveness analysis is viewed with a strong presumption that counsel's actions were reasonable and that even if found unreasonable,

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[11] *State v. Dunster*, 278 Neb. 268, 769 N.W.2d 401 (2009).

[12] See, *State v. Robinson*, 285 Neb. 394, 827 N.W.2d 292 (2013); *State v. McKinney*, 279 Neb. 297, 777 N.W.2d 555 (2010).

[13] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[14] *State v. Dunkin*, 283 Neb. 30, 807 N.W.2d 744 (2012); *State v. Golka*, 281 Neb. 360, 796 N.W.2d 198 (2011).

[15] *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013).

[16] See *State v. Dunkin*, *supra* note 14.

[17] See, *id.*; *State v. Golka*, *supra* note 14; *State v. Vo*, 279 Neb. 964, 783 N.W.2d 416 (2010).

the error justifies setting aside the judgment only if there was prejudice.[18]

In Fester's brief to this court, he asserts that his counsel was ineffective in three respects. We examine each of them in turn.

Investigation and Review by Counsel

Fester alleges that his counsel provided ineffective assistance because he did not directly review any discovery materials with Fester and did not adequately investigate the case. Fester alleges that because of these alleged shortcomings, he was forced to enter his guilty pleas.

The district court examined this claim in light of all the evidence presented and found that Fester failed to establish that counsel provided ineffective assistance. The court largely limited its analysis to whether counsel's performance was deficient. In doing so, it found that Fester's claims were substantially negated by the statements he made on the record at the time he entered his pleas—specifically, that he was satisfied with counsel's representation and that he had had ample time to discuss the case with him. Further, the court relied upon counsel's testimony that although he did not give discovery reports directly to Fester, he kept Fester informed on an "'ongoing'" basis of what he was reviewing and met with Fester 10 times outside of the courtroom. The court also found that Fester's counsel spent approximately 285 hours preparing for trial and that he continued to prepare until the plea agreement was reached. None of these factual findings are clearly erroneous, and we agree that on these facts, counsel did not perform deficiently. We affirm the district court's finding that counsel was not ineffective in this regard.

Promise of 21- to 35-Year Sentences

Fester claims that his attorney told him he would be sentenced to 21 to 35 years in prison on the second degree murder

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[18] *State v. Dunkin*, *supra* note 14.

convictions and that but for this assurance, he would not have entered into the plea agreement. But the district court found the evidence refuted this claim and that counsel did not perform deficiently. Specifically, the court found that prior to accepting the plea, Fester was advised that the possible penalty for second degree murder was 20 years to life in prison. The court also credited his attorney's testimony that he did not tell Fester he would be sentenced to 20 to 35 years in prison on the murder convictions and 1 to 5 years in prison on the weapon conviction. In addition, the record demonstrates that the plea agreement itself set forth the possible penalties for second degree murder and that Fester read and signed the plea agreement. We agree with the district court that the evidence establishes that Fester's counsel did not perform deficiently in this respect and therefore did not provide Fester ineffective assistance of counsel.

Trial Preparation

Fester alleges that although trial was set for February 26, 2007, by January 19, his attorney had not taken any depositions, subpoenaed any witnesses, or discussed Fester's right to testify in his own defense at trial. He implies that due to this lack of preparation, he was coerced into entering into the plea agreement.

But Fester testified that at the time he entered his pleas, he understood his attorney was prepared to try the case. He also informed the court during the plea colloquy that he was satisfied with his attorney's services and had had ample time to review the case and the plea agreement with him. This evidence directly negates his claim that he was forced to enter the pleas because he thought his attorney was unprepared for trial. We further note the record demonstrates that counsel engaged in substantial pretrial preparation and that in the course of doing so, he was confronted with significant evidence against Fester. Under the circumstances, it was a reasonable strategy to enter into the plea agreement which reduced the charges to second degree murder.[19] We agree with the district court

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[19] See, generally, *State v. Edwards*, *supra* note 8.

that Fester's counsel did not provide ineffective assistance in this regard.

CONCLUSION

For all of the foregoing reasons, we affirm the decision of the district court denying postconviction relief.

AFFIRMED.

DOWAYNE PETERSON, APPELLANT, V. HOMESITE INDEMNITY COMPANY, A KANSAS CORPORATION, APPELLEE.

840 N.W.2d 885

Filed December 20, 2013. No. S-12-875.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.
2. ____: ____. An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.
3. **Insurance: Contracts: Judgments: Appeal and Error.** The interpretation of an insurance policy presents a question of law that an appellate court decides independently of the trial court.
4. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
5. ____. Summary judgment proceedings do not resolve factual issues, but instead determine whether there is a material issue of fact in dispute.
6. ____. If a genuine issue of fact exists, summary judgment may not properly be entered.
7. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.
8. **Bailment: Words and Phrases.** Bailment is defined as the delivery of personal property for some particular purpose or on mere deposit, upon a contract, express or implied, that after the purpose has been fulfilled, it shall be redelivered to the person who delivered it or otherwise dealt with according to that person's directions or kept until reclaimed, as the case may be.

9. ____: ____. Bailment involves the delivery of personal property by one person to another in trust for a specific purpose, with a contract, express or implied, that the trust shall be faithfully executed and the property returned or duly accounted for when the special purpose is accomplished.
10. **Conversion: Words and Phrases.** Conversion is any unauthorized or wrongful act of dominion exerted over another's property which deprives the owner of his property permanently or for an indefinite period of time.

Appeal from the District Court for Sarpy County: MAX KELCH, Judge. Reversed and remanded for further proceedings.

Ralph A. Froehlich, of Locher, Pavelka, Dostal, Braddy & Hammes, L.L.C., for appellant.

Thomas A. Grennan and Andrew J. Wilson, of Gross & Welch, P.C., L.L.O., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

WRIGHT, J.

I. NATURE OF CASE

This case presents the issue whether Dowayne Peterson suffered a loss of personal property due to theft, as defined in his homeowner's insurance policy. The question presented in this appeal is whether there is a material issue of fact in dispute.

Peterson contracted with a "shipper agent" to move his household goods and personal property from Nebraska to Florida. Individuals contacted by the shipper agent took possession of Peterson's property and demanded additional payment before delivery of the property to Florida. The property was never delivered to Florida or returned to Peterson.

Peterson's insurer, Homesite Indemnity Company (Homesite), denied coverage, claiming that a theft had not occurred. The district court found no material issues of fact in dispute and concluded that a theft had not occurred. It granted summary judgment in favor of Homesite.

Because there are genuine issues of material fact whether there was a theft, we reverse the judgment of the district court and remand the cause for further proceedings.

II. SCOPE OF REVIEW

[1] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence. *Shada v. Farmers Ins. Exch.*, 286 Neb. 444, 840 N.W.2d 856 (2013).

[2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law. *Id.*

[3] The interpretation of an insurance policy presents a question of law that we decide independently of the trial court. *Alsidez v. American Family Mut. Ins. Co.*, 282 Neb. 890, 807 N.W.2d 184 (2011).

III. FACTS

In August 2007, Peterson obtained a homeowner's insurance policy from Homesite for his apartment in Bellevue, Nebraska. This policy insured against the "direct physical loss" of Peterson's personal property or that of his immediate family when caused by any of 16 listed perils, including theft. The term "theft" was not defined.

Peterson owned a house in Florida. On July 15, 2008, Peterson contacted United States Van Lines of Texas (USVLT) to move his personal property from Bellevue to Florida. He entered into a contract that provided for the disassembly, loading, transport, unloading, and reassembly of up to 8,000 pounds of household goods for an estimated cost of $3,845.37.

The final cost for the move would be determined based on the actual weight of the shipment. If "any additional pieces, packing services, weight or labor services [were] added at the origin or destination to those quoted," Peterson would be charged additional amounts. Peterson waived his right to have USVLT perform a visual estimate and instead prepared an

inventory of the items to be moved, which USVLT then used to calculate the estimated cost.

The contract provided that USVLT was to serve only as the "moving coordinator/shipper agent" and would not physically move Peterson's property. USVLT was "not responsible for any acts or omissions of the Carrier or its employees or agents." Peterson was "subject to all applicable laws and the general terms and conditions of the Carrier," which included a requirement that he "may not receive possession of [his] goods until all charges are paid in full."

On Friday, August 15, 2008, men named "Arthur" and "Earl" arrived at Peterson's apartment in a U-Haul truck. They identified themselves as being with USVLT. Peterson was concerned because they had arrived in a U-Haul instead of "a long moving truck." USVLT confirmed that it had sent Arthur and Earl to complete Peterson's move and explained that their normal moving truck had broken down. USVLT arranged for Desmond Campbell—Arthur and Earl's superior—to call Peterson with reassurance that the U-Haul would hold all of Peterson's property. But everything did not fit in the U-Haul, and Campbell arranged for a second truck to load the remainder of Peterson's property. Arthur agreed to tow Peterson's wife's vehicle behind the U-Haul, for which Peterson paid $500 cash.

Arthur and Earl left around noon on Saturday, August 16, 2008, with the full U-Haul and the vehicle. They expected to deliver Peterson's property to his residence in Florida on Sunday. On Saturday night, a Budget truck arrived to move the remainder of Peterson's property. Once Peterson received verification from Campbell that the men with the truck worked for Campbell, the two men loaded the remaining items and left. For simplicity, we refer to Arthur, Earl, and the two men in the second truck collectively as "the movers."

On August 15 and 16, 2008, Peterson signed numerous documents given to him by the movers. These documents indicated that the movers and their superior, Campbell, were associated with two moving companies based in Georgia: Move Direct Relocation and Advance Budget Moving & Storage. None of

the paperwork provided by the movers was from USVLT, but USVLT confirmed that it had sent the movers.

After several delays in delivery, Campbell informed Peterson that the shipment weighed 4,000 pounds more than estimated and that Peterson owed an additional $5,100. Peterson thought the alleged weight of the shipment was "an outrageous amount" and asked for documentation of the weight. Under the USVLT contract, Peterson had agreed to pay approximately $3,800 for the transport of 8,000 pounds of personal property.

As documentation of the weight of Peterson's shipment, Campbell faxed four weigh tickets to USVLT, which in turn faxed the weigh tickets to Peterson. The weigh tickets related to at least three different trucks, but only two had been used in the move. One weigh ticket described a semi-trailer, not the small rental trucks, and originated from a weigh station in Indiana. It was unclear whether the weight of the vehicle being towed by the movers was included in the weigh tickets. Three of the four weigh tickets were dated before Peterson's move. Because Peterson found "serious discrepancies" in the weigh tickets that "indicated that the documents were not reliable," he said that he would pay an additional amount only after he was satisfied as to the weight of the shipment.

Peterson proposed that Campbell meet Peterson's wife at a weigh station in Florida to verify that Peterson's shipment was in fact over the estimated weight. Campbell rejected the proposal and stated that he would not deliver Peterson's property unless and until Peterson paid an additional amount in advance of delivery. USVLT asked Campbell to comply with Peterson's request to weigh the truck in the presence of Peterson's wife, but Campbell said that he would not "deliver anything until [he got his] money." On August 21, 2008, USVLT refused to assist Peterson further in securing delivery of his property.

On August 22, 2008, Peterson again attempted to get his property from Campbell by assuring payment upon delivery. Campbell continued to demand payment before delivery and stated that Peterson's property was being stored in Georgia.

Peterson did not send additional money and did not receive any of his personal property.

Peterson filed a claim with Homesite under his homeowner's insurance policy. Homesite sent Peterson an initial payment of $2,000 but later denied his claim. Peterson received $25,000 for the loss of personal property and $5,000 for the loss of his vehicle under separate insurance policies with another insurance company.

Peterson sued Homesite for breach of contract and bad faith in denying the insurance claim. In response, Homesite asserted multiple affirmative defenses, including the allegation that Peterson lost his property as a result of a contract dispute, not theft. It counterclaimed to recover the $2,000 it had advanced to Peterson.

Homesite moved for summary judgment. After a hearing at which both parties adduced evidence, the district court sustained the motion. It found that Peterson lost his property in a contractual dispute after voluntarily delivering the property into the custody of USVLT and that there was "no showing of criminal intent." The court sustained Homesite's motion for summary judgment and dismissed Peterson's complaint with prejudice. It later dismissed Homesite's counterclaim without prejudice.

Peterson timely appeals. Pursuant to our statutory authority to regulate the dockets of the appellate courts of this state, we moved the case to our docket. See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

IV. ASSIGNMENTS OF ERROR

Peterson assigns, restated, that the district court erred in granting Homesite's motion for summary judgment by (1) making factual findings where genuine issues of material fact exist and failing to give him the benefit of all reasonable inferences deducible from the evidence, (2) concluding that no theft had occurred because "a contractual dispute arose" after he "voluntarily delivered" his property into the custody of USVLT, and (3) dismissing his cause of action for bad faith.

V. ANALYSIS

[4-6] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Shipley v. Department of Roads*, 283 Neb. 832, 813 N.W.2d 455 (2012). Summary judgment proceedings do not resolve factual issues, but instead determine whether there is a material issue of fact in dispute. *Young v. Govier & Milone*, 286 Neb. 224, 835 N.W.2d 684 (2013). If a genuine issue of fact exists, summary judgment may not properly be entered. *Cartwright v. State*, 286 Neb. 431, 837 N.W.2d 521 (2013).

[7] The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. *Id.* After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion. *Id.* In the summary judgment context, a fact is material only if it would affect the outcome of the case. *Professional Mgmt. Midwest v. Lund Co.*, 284 Neb. 777, 826 N.W.2d 225 (2012).

1. Summary Judgment on Breach of Contract Claim

Peterson claims that the district court erred by making factual findings on genuine issues of material fact. We therefore examine what are the material facts in Peterson's breach of contract claim against Homesite. The material facts are those facts that relate to the alleged theft of Peterson's property. In order to consider what facts are material to Peterson's claim, we must first determine what definition of theft is applicable to Peterson's homeowner's insurance policy.

(a) Definition of Theft Under Peterson's Insurance Policy

An insurance policy is a contract, and its terms provide the scope of the policy's coverage. *Rickerl v. Farmers Ins. Exch.*, 277 Neb. 446, 763 N.W.2d 86 (2009). In construing an insurance contract, a court must give effect to the instrument as a whole and, if possible, to every part thereof. *Travelers Indemnity Co. v. International Nutrition*, 273 Neb. 943, 734 N.W.2d 719 (2007). We construe insurance contracts like other contracts, according to the meaning of the terms that the parties have used. *Federated Serv. Ins. Co. v. Alliance Constr.*, 282 Neb. 638, 805 N.W.2d 468 (2011). "In cases of doubt, [an insurance policy] is to be liberally construed in favor of the insured." *Modern Sounds & Systems, Inc. v. Federated Mut. Ins. Co.*, 200 Neb. 46, 49, 262 N.W.2d 183, 186 (1978).

The relevant provisions of Peterson's homeowner's insurance policy are:

> We insure for direct physical loss to the property described in Coverage C caused by a peril listed below unless the loss is excluded in SECTION I - EXCLUSIONS.
>
> . . . .
>
> 9. **Theft**, including attempted theft and loss of property from a known place when it is likely that the property has been stolen.

(Emphasis in original.) However, the policy did not define theft. There were several specific exclusions, such as theft by an insured, that were not covered under the theft provision, but none of those exclusions apply to Peterson's situation.

In the absence of an explicit definition for the term "theft," we examine the policy to determine what definition is applicable. The district court applied the definition of theft from *Modern Sounds & Systems, Inc., supra*, and we agree that this definition of theft applies to Peterson's policy.

In *Modern Sounds & Systems, Inc.*, 200 Neb. at 48, 262 N.W.2d at 185, we examined an insurance policy that "provided that the defendant would pay for any loss 'caused by

theft or larceny.'" We held that "in an automobile insurance policy providing coverage against theft, in which the term is not defined, the term 'theft' will be construed broadly to include a loss caused by any unlawful or wrongful taking of the insured vehicle with criminal intent." *Id.* at 52, 262 N.W.2d at 187.

Similar to Peterson's policy quoted above, the policy language in *Modern Sounds & Systems, Inc., supra,* identified a specific peril for which coverage was provided. Under a specific perils policy, also called a named perils policy, property is covered only if the occurrence arises from one of the perils listed in the policy. See *Poulton v. State Farm Fire & Cas. Cos.*, 267 Neb. 569, 675 N.W.2d 665 (2004). In *Modern Sounds & Systems, Inc.*, 200 Neb. at 48, 262 N.W.2d at 185, "'theft or larceny'" was a listed peril for which coverage was provided under the insurance policy. In the instant case, "theft" was a listed peril. *Modern Sounds & Systems, Inc., supra*, involved the interpretation of a particular policy, but we considered the definition of theft within the broader context of all specific perils policies.

Neither of the parties disputes the facts that Peterson had a specific perils policy with Homesite, that the policy generally covered theft, and that his policy did not define theft. Because Peterson's homeowner's insurance policy was a specific perils policy that failed to define theft, we apply a broad definition to the term "theft," just as we did in *Modern Sounds & Systems, Inc., supra*.

Homesite claims a narrow application of the term "theft" should be applied because the policy allegedly demonstrated the parties' desire for theft to be defined narrowly. According to Homesite, because Peterson's policy had no exclusions, we should conclude that "the term theft is not meant to be used in a broad sense." Brief for appellee at 12. We are not persuaded by this argument.

Peterson's policy had exclusions to theft coverage—the policy listed six occurrences of theft that were not covered. Just as in *Modern Sounds & Systems, Inc. v. Federated Mut. Ins. Co.*, 200 Neb. 46, 262 N.W.2d 183 (1978), those limited exclusions indicate that the term "theft" covered all occurrences

of theft other than the six specifically listed and would have covered those occurrences but for the exclusions. Additionally, Peterson's policy provided coverage against the loss of property resulting from "[t]heft, including attempted theft and loss of property from a known place when it is likely that the property has been stolen." (Emphasis omitted.) This language, including attempted theft and likely theft, indicates that the parties intended a broad meaning of theft within Peterson's policy. Even if this were not clear, "[i]n cases of doubt, [an insurance policy] is to be liberally construed in favor of the insured." *Id.* at 49, 262 N.W.2d at 186.

Despite Homesite's arguments, we find that applying this broad definition to Peterson's homeowner's insurance policy would not be contrary to the intent of the parties to that policy. Therefore, using the broad definition of theft in *Modern Sounds & Systems, Inc., supra*, we interpret the theft provision in Peterson's policy to cover any loss of the insured's personal property caused by an unlawful or wrongful taking with criminal intent.

(b) Whether Genuine Issues of Material Fact Exist

Given the applicable definition of theft, to ultimately succeed on his claim of theft, Peterson must prove that (1) he suffered a loss (2) caused by the unlawful or wrongful taking of the insured property (3) with criminal intent. Intent "must be determined from the particular circumstances of each case." 10A Lee R. Russ et al., Couch on Insurance 3d § 151:15 at 151-24 (2005). Thus, the material facts are those that relate to whether there was an unlawful or wrongful taking of the property with criminal intent.

(i) Homesite's Evidence

Homesite argues that it was entitled to summary judgment because Peterson did not suffer a loss due to theft. It claims Peterson did not suffer a theft because the evidence showed that he was embroiled in a contract dispute with Campbell and the movers, to whom Peterson had entrusted his property in a bailment.

[8,9] Bailment is defined as

> the delivery of personal property for some particular purpose or on mere deposit, upon a contract, express or implied, that after the purpose has been fulfilled, it shall be redelivered to the person who delivered it or otherwise dealt with according to that person's directions or kept until reclaimed, as the case may be.

Gerdes v. Klindt, 253 Neb. 260, 268, 570 N.W.2d 336, 342 (1997). Nebraska case law also states that bailment involves the "delivery of personal property by one person to another in trust for a specific purpose, with a contract, express or implied, that the trust shall be faithfully executed and the property returned or duly accounted for when the special purpose is accomplished." *Id.* at 268, 570 N.W.2d at 342-43. The law of bailments generally applies to "the delivery and acceptance of custody of personal property for safekeeping, transportation, or storage." 8A Am. Jur. 2d *Bailments* § 5 at 525 (2009).

Homesite adduced evidence that the agreement between Peterson and the movers constituted a bailment. Peterson delivered his property to Campbell and the movers for the express purpose of having the property transported to Florida. The reason for Peterson's arrangement with USVLT was the transportation and delivery of his personal property to Florida. According to Homesite's evidence, Campbell and the movers acknowledged that they were given possession of Peterson's property in accordance with the USVLT contract and for that same purpose—delivery to Florida. Such evidence would establish the existence of an agreement between Peterson and the movers that once the property had been transported, the movers would redeliver possession of the property to Peterson at his house in Florida. This arrangement meets the basic definition of a bailment.

Because Homesite adduced evidence that if uncontroverted, would establish a bailment, we examine the legal implications of bailment to this case. Homesite argues that because Peterson voluntarily gave his property to the movers as part of a bailment, there can be no theft under his homeowner's insurance policy. It argues that the existence of a bailment situation

necessarily makes the dispute between Peterson and the movers a "contract dispute" for which Peterson cannot recover. Brief for appellee at 15. These arguments ignore the fact that the person entrusted with bailed property (the bailee) is limited in what he or she can do with such property.

[10] Under a bailment, the person delivering the property for a specific purpose (the bailor) has "the right to have the bailed property returned to him or her strictly in accordance with the terms of the bailment contract." 8A Am. Jur. 2d, *supra*, § 130 at 654. If the bailee "fails or refuses to return the property in the manner expressly required by the contract," he or she "may be liable for conversion, or for breach of contract." *Id.* In Nebraska, a bailee who handles bailed property in a manner that is in breach of the bailment agreement—that is, in a manner other than that required by the contract—commits conversion. See *Chadron Energy Corp. v. First Nat. Bank*, 236 Neb. 173, 459 N.W.2d 718 (1990). Conversion is any unauthorized or wrongful act of dominion exerted over another's property which deprives the owner of his property permanently or for an indefinite period of time. *Brook Valley Ltd. Part. v. Mutual of Omaha Bank*, 285 Neb. 157, 825 N.W.2d 779 (2013).

In the instant case, the fact that Campbell and the movers initially obtained possession of Peterson's property with his consent does not preclude the possibility that they may have intended to convert the property for their own use. Because Peterson delivered possession of his property to Campbell and the movers for a specific purpose, any actions by the movers that were contrary to that purpose went beyond the scope of Peterson's initial consent and could be a theft.

In the absence of a provision specifically excluding conversion from theft coverage, Peterson's homeowner's insurance policy encompasses theft by conversion. The policy does not exclude conversion from theft coverage, and therefore, conversion falls within the broad definition of theft in Peterson's policy.

Homesite's evidence of bailment showed that Campbell and the movers took possession of Peterson's property for the specific purpose of transporting and delivering it to Florida. It

also showed that once Campbell and the movers obtained possession of Peterson's property in the context of a bailment, they kept the property according to what they asserted to be their contractual rights. If this evidence were uncontroverted, there is no showing that a theft occurred.

The contract with USVLT provided the carrier would not deliver the goods until all charges were paid in full. Through evidence that USVLT acknowledged sending the movers to transport Peterson's belongings and that Campbell was their superior, Homesite established that Campbell was "the Carrier" referenced in the USVLT contract. Therefore, if this provision in the contract was lawful, Campbell and the movers were not prohibited by Peterson's contract with USVLT from retaining possession of Peterson's property until Peterson paid in full.

Homesite presented evidence that Campbell kept Peterson's property because Campbell claimed Peterson owed more money. If uncontroverted, this evidence would support findings that Campbell and the movers did not keep Peterson's property with criminal intent and that their continued possession of Peterson's property was based on their contractual right to deliver the property only after Peterson paid in full. In the absence of an unlawful taking with criminal intent, no theft occurred. And if no theft occurred, Homesite did not breach its contract with Peterson by denying his claim. Therefore, Homesite made a prima facie case that it was entitled to judgment as a matter of law on the breach of contract claim.

(ii) Peterson's Evidence

Once Homesite made its prima facie case, the burden shifted to Peterson to show the existence of genuine issues of material fact that would prevent judgment as a matter of law. See *Cartwright v. State*, 286 Neb. 431, 837 N.W.2d 521 (2013). Peterson met this burden by presenting evidence from which it could reasonably be inferred that Campbell's actions were committed with criminal intent and not with the commercial intent suggested by Homesite. Per our standard of review, we view this evidence in a light favorable to Peterson.

See *Shada v. Farmers Ins. Exch.*, 286 Neb. 444, 840 N.W.2d 856 (2013).

Peterson adduced evidence showing that the movers' actions leading up to and during Peterson's move on August 15 and 16, 2008, cast doubt upon their affiliation with legitimate businesses engaged in the interstate transportation of household goods. USVLT's contract with Peterson explained that USVLT would engage a carrier to move Peterson's personal property, but the contract did not name the carrier. Indeed, USVLT never disclosed which carriers it used, in violation of federal regulations. See 49 C.F.R. § 371.109(a) (2012). The contract also provided that the carrier could withhold delivery until Peterson paid in full. In light of the fact that Peterson opted to receive a binding estimate from USVLT, this provision allowing the carrier to withhold delivery may have been prohibited by federal law. See 49 C.F.R. § 375.403(a)(8) through (10) (2012). Peterson was asked to initial next to each of these provisions in addition to signing at the bottom of the contract.

The evidence showed that the information Peterson had about the movers' affiliation with USVLT or any legitimate carrier was questionable. Upon arrival in Bellevue, the movers presented Peterson with paperwork from two separate moving companies in Georgia, neither of which was registered to do business in Georgia. The telephone numbers provided on the paperwork were disconnected, and the addresses on the paperwork corresponded to vacant lots that were for sale. On the first day of the move, Peterson reached the individual allegedly in charge of these companies—Campbell—only after USVLT referred him to a different telephone number, which in turn directed him to a third number. Peterson was able to reach Campbell and the movers only via cell phone. The movers did not offer any paperwork indicating a connection with USVLT. And when Peterson asked for identification, they did not provide it. Under the federal regulations governing interstate carriers of household goods, the movers were required to provide at least their names, addresses, and U.S. Department of Transportation numbers. See 49 C.F.R. § 375.501(a)(1) (2012).

As described by Peterson, the performance of the movers was not what one would expect from employees of a professional moving company. On the first day of the move, the movers arrived in a small rental truck, despite a prior arrangement for "a long moving truck." Even after Peterson told them that his personal property was located in an apartment and two garages, the movers and Campbell assured Peterson that they could fit his belongings in the small rental truck. When the movers realized later that Peterson's belongings would not fit into the small rental truck, they arranged for a second rental truck, which did not arrive until the evening of August 16, 2008, and did not finish loading Peterson's property until midnight.

The business of transporting household goods through interstate commerce is highly regulated, see 49 C.F.R. § 375.101 et seq. (2012), and yet, Campbell and the movers seemed unprepared to carry out Peterson's move professionally and in compliance with federal law. Given that they represented themselves as professional movers affiliated with USVLT and two moving companies from Georgia who engaged in the interstate transport of household goods, the actions of Campbell and the movers leading up to Peterson's move were highly suspect.

Once the movers had possession of Peterson's property, the reason for their dubious actions became almost immediately apparent. Within a day, the movers called Peterson to delay delivery. And a few days later, Campbell called Peterson and demanded additional money because Campbell claimed that the shipment was over the estimated weight. For the initial move of 8,000 pounds, USVLT charged Peterson about $3,800, or approximately $1,900 to move 4,000 pounds. Once in possession of Peterson's property, Campbell demanded $5,100 for the additional 4,000 pounds—almost three times as much as Peterson had paid per pound under the initial estimate. Furthermore, Campbell wanted Peterson to send the additional funds to an unidentified post office box in Georgia, refused Peterson's offer of a cashier's check, and would accept only cash or a wire transfer.

Peterson adduced evidence that Campbell was unwilling to provide Peterson with accurate documentation to support the demand for additional money. When Peterson asked for documentation that the shipment was overweight, Campbell provided weigh tickets that contained many discrepancies. One weigh ticket described the truck being weighed as a semi-trailer, which the U-Haul and Budget trucks were not. That weigh ticket was from a weigh station in Indiana, which was not close to the route Peterson told the movers to take to Florida. Based on the identification numbers printed on each ticket, the four weigh tickets related to at least three different trucks, when only two trucks were used to transport Peterson's property. And three of the four weigh tickets were dated *before* Peterson's move. Peterson stated that when confronted with these discrepancies, Campbell "was not able to give [Peterson] a satisfactory explanation." One of the movers denied being in Indiana or signing a weigh ticket from there. Campbell and Arthur also provided conflicting accounts whether the weigh tickets included the weight of the vehicle being towed by the U-Haul.

In light of the unusual weigh tickets, Peterson promised to make additional payment when he was satisfied of the actual weight of his property and asked Campbell to reweigh the shipment in the presence of Peterson's wife. USVLT ordered Campbell, as its carrier, to reweigh the shipment, but Campbell refused to reweigh Peterson's shipment or attempt delivery. Under 49 C.F.R. §§ 375.513 and 375.517 (2012), as a carrier, Campbell was required to grant Peterson's requests to have his property reweighed in person.

At one point, Campbell agreed to confirm that he was still in possession of Peterson's belongings, but failed to follow through. A police officer in Georgia claimed that Campbell showed the officer where Peterson's property was being stored, but the officer never confirmed that Peterson's property was in fact being stored there and could not locate Peterson's wife's vehicle.

The evidence supports an inference that Campbell and the movers acted with criminal intent in obtaining possession of

Peterson's property under the auspices of a legitimate bailment to transport property. Campbell and the movers claimed to be associated with supposedly legitimate moving companies, yet failed to provide valid business addresses or business telephone numbers. They arrived in rented trucks that were too small for the job described in the USVLT contract. Furthermore, the contract signed by Peterson and USVLT contained provisions contrary to federal law and conveniently put Campbell and the movers in a position where they could hold on to Peterson's property simply by claiming that he owed additional money. Campbell and the movers made precisely such a claim within a few days of loading Peterson's property. From that point forward, they refused to deliver the property, even when Peterson offered to pay the additional amount demanded in the generally accepted form of a cashier's check.

Looking back upon the movers' actions in Bellevue with knowledge of the later events, it can reasonably be inferred that acquiring possession of Peterson's property under the auspices of a bailment was the means of gaining leverage that could later be used to make a demand for additional money. Such facts support the inference that Campbell and the movers obtained possession of the property by false pretenses, in which case a bailment may not have been created in the first place. See, e.g., *Reserve Ins. Co. v. Interurban &c. Lines*, 105 Ga. App. 278, 124 S.E.2d 498 (1962). But more important, this evidence supports an inference that Campbell and the movers unlawfully took Peterson's property with criminal intent.

The evidence also supports the inference that Campbell and the movers had no intention of completing the move as required by their bailment agreement with Peterson. They demanded an additional $5,100, claiming the load exceeded the estimated weight by 4,000 pounds. When asked for confirmation of the excess weight, they produced false weigh tickets that related to more trucks than were involved in the move and that were dated several weeks prior to the move. Peterson still agreed to pay $5,100 if Campbell would reweigh the trucks at a licensed weigh station in the presence of Peterson's wife, but Campbell refused to do so. Campbell stated that he would not deliver the

property until Peterson mailed $5,100 in cash to a post office box in Georgia. Peterson offered to obtain a cashier's check that he would give to Campbell upon delivery, but Campbell demanded cash or a wire transfer. Peterson offered multiple times to meet Campbell's demands in a manner that ensured both delivery of the property and payment for the additional 4,000 pounds—a "win-win" situation if both parties were acting upon legitimate business motives.

(iii) Conclusion

Viewing the evidence in the light most favorable to Peterson, we determine there are reasonable inferences that Campbell and the movers wrongfully took Peterson's property with criminal intent when they took Peterson's property under the auspices of a bailment and when they refused delivery in an attempt to elicit additional money from Peterson. Such inferences demonstrate the existence of a genuine issue of material fact as to whether a theft occurred. If a genuine issue of fact exists, summary judgment may not properly be entered. *Cartwright v. State*, 286 Neb. 431, 837 N.W.2d 521 (2013). Therefore, the district court erred in granting Homesite's motion for summary judgment on the breach of contract claim.

2. Summary Judgment on Bad Faith Claim

Peterson also alleges that the district court erred in entering summary judgment in Homesite's favor on his claim for bad faith. The court granted summary judgment against Peterson on his bad faith claim for the reason that it had determined no theft had occurred. Because the finding that there was no theft was error, it was also error for the court to grant summary judgment on the bad faith claim.

VI. CONCLUSION

For the foregoing reasons, we reverse the order of the district court which granted summary judgment in favor of Homesite on the breach of contract and bad faith claims, and we remand the cause for further proceedings.

Reversed and remanded for further proceedings.

CATHERINE D. LANG, COMMISSIONER OF LABOR, APPELLANT, V. HOWARD COUNTY, NEBRASKA, AND ROBERT J. SIVICK, APPELLEES.

840 N.W.2d 876

Filed December 20, 2013. No. S-13-010.

1. **Counties: Public Officers and Employees: Time.** Generally, a county attorney is elected in each county at the statewide general election held every 4 years and serves a term of 4 years or until his or her successor is elected and qualified.
2. **Counties: Public Officers and Employees.** If no county attorney is elected at the statewide general election or if a vacancy occurs for any other reason, a county board may appoint a qualified attorney to the office of county attorney.
3. **Counties: Public Officers and Employees: Contracts.** If a county board appoints an attorney to the office of county attorney, it must negotiate a contract with the attorney which specifies the terms and conditions of the appointment.
4. **Employment Security: Judgments: Appeal and Error.** In an appeal from the Nebraska Appeal Tribunal to the district court regarding unemployment benefits, the district court conducts the review de novo on the record, but on review by the Nebraska Court of Appeals or the Nebraska Supreme Court, the judgment of the district court may be reversed, vacated, or modified for errors appearing on the record. When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
5. **Judgments: Statutes: Appeal and Error.** Concerning questions of law and statutory interpretation, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
6. **Political Subdivisions: Employment Security: Words and Phrases.** Services performed for a political subdivision in a position which, under or pursuant to the state law, is designated "a major nontenured policymaking or advisory position" are excluded from the definition of "employment" under the Employment Security Law.
7. **Statutes.** Absent a statutory indication to the contrary, words in a statute will be given their ordinary meaning.
8. **Public Officers and Employees.** Under Nebraska statutes, an important function of a county attorney is to provide advice.
9. **Public Officers and Employees: Employment Security: Words and Phrases.** "Magic words" are not necessary for a position to be designated "a major nontenured policymaking or advisory position" under the Employment Security Law.
10. **Public Officers and Employees.** In determining whether a position is a major nontenured policymaking or advisory position, it is enough that a statute, regulation, executive order, or the like communicate the concept that the position is policymaking or advisory.

11. **Statutes.** Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning.
12. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the District Court for Howard County: MARK D. KOZISEK, Judge. Reversed.

John H. Albin, Thomas A. Ukinski, and Caleb Dutson, Senior Certified Law Student, for appellant.

Robert J. Sivick, pro se.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

CASSEL, J.

INTRODUCTION

An appointed county attorney who lost his position when another attorney was elected to the office sought unemployment insurance benefits, but the Nebraska Department of Labor (Department) determined that he was ineligible because his wages were not for covered "employment."[1] The Nebraska Appeal Tribunal reversed the Department's determinations, and the district court affirmed. Because we conclude that the position of county attorney is one that has been designated "a major nontenured policymaking or advisory position"[2] under or pursuant to Nebraska law, we reverse the judgment of the district court.

BACKGROUND

[1-3] Generally, a county attorney is elected in each county at the statewide general election held every 4 years and serves a term of 4 years or until his or her successor is elected and qualified.[3] However, if no county attorney is elected at the statewide general election or if a vacancy occurs for any other reason, a county board may appoint a qualified attorney to

[1] See Neb. Rev. Stat. § 48-604 (Reissue 2010).

[2] § 48-604(6)(f)(v).

[3] See Neb. Rev. Stat. § 32-522 (Reissue 2008).

the office of county attorney.[4] If the county board appoints an attorney to the office of county attorney, it must negotiate a contract with the attorney which specifies the terms and conditions of the appointment.[5]

Due to a vacancy, Howard County, Nebraska, hired Robert J. Sivick as its interim county attorney under a written contract that ran from December 1, 2007, through November 30, 2008. Sivick continued as the county attorney under successive contracts running from December 1, 2008, through January 1, 2010, and from January 1 through December 31, 2010.

Under the employment contracts, Sivick agreed to perform all of the duties of a county attorney as dictated by the statutes.[6] The contracts specified that such duties included providing advice and legal services to the Howard County Board of Commissioners (Board) and all departments of Howard County government. Sivick estimated that he spent 20 to 30 percent of his time providing advice and legal services to the Board.

Sivick was unsuccessful in his bid to be elected the county attorney for the term of office running from January 2011 to January 2015. His last date of work as the Howard County Attorney was January 6, 2011. He subsequently filed a claim for unemployment insurance benefits with the State of Nebraska.

Nebraska law sets forth numerous exceptions to the term "employment."[7] The term does not include service performed while employed by a political subdivision

> if such services are performed by an individual in the exercise of his or her duties: *(i) As an elected official*; (ii) as a member of the legislative body or a member of the judiciary of a state or political subdivision thereof; (iii) as a member of the Army National Guard or Air National Guard; (iv) as an employee serving on a

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[4] See Neb. Rev. Stat. § 23-1201.01(2) (Reissue 2012).

[5] See *id.*

[6] See, e.g., Neb. Rev. Stat. § 23-1201 (Reissue 2012).

[7] § 48-604(6).

> temporary basis in case of fire, storm, snow, earthquake, flood, or similar emergency; *(v) in a position which, under or pursuant to the state law, is designated a major nontenured policymaking or advisory position*, or a policymaking or advisory position, the performance of the duties of which ordinarily does not require more than eight hours per week; or (vi) as an election official or election worker if the amount of remuneration received by the individual during the calendar year for services as an election official or election worker is less than one thousand dollars.[8]

The Department determined that Sivick's wages from Howard County were not covered wages for the purpose of unemployment insurance and, thus, could not be used to establish an unemployment insurance claim. The Department also determined that Sivick was not monetarily eligible for unemployment benefits. Sivick appealed these determinations, and the appeal tribunal held a hearing on each matter.

The appeal tribunal reversed the determinations of the Department. In one matter, the appeal tribunal held that Sivick's earnings were covered wages for the purposes of unemployment insurance benefits because Sivick was not an elected official, the majority of his duties were not spent in policymaking or advisory capacities, and there was no statutory designation of his position being a major advisory position. The appeal tribunal determined that Sivick earned sufficient wages to meet the base period qualification requirements. In the other matter, the appeal tribunal stated that because it found Sivick's wages to be covered wages, his wages should be considered in determining whether he was monetarily eligible to receive benefits. The appeal tribunal stated that Sivick's wages would be approximately $13,000 in each quarter of the base period and that because Sivick's wages were covered wages, the Department's monetary determination was erroneous. The Commissioner of Labor (Commissioner) sought review of the two interrelated decisions of the appeal tribunal.

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[8] § 48-604(6)(f) (emphasis supplied).

The district court affirmed the decisions of the appeal tribunal in both matters. The court reasoned that § 48-604(6)(f)(i) exempted an elected official, but that it did not exempt a person appointed to fill an elective position. The court stated that Sivick's position was clearly untenured and that no one argued to the contrary. In considering whether Sivick held a position which was designated a "major advisory position," the court stated that "the duties Sivick actually performed are of little import" and that it would "look only to whether Sivick's position was a major nontenured policymaking or advisory position pursuant to, or under, the laws of Nebraska." The court found no law or other designation that Sivick's position was designated a "major nontenured policymaking or advisory position." Thus, the court stated that upon its de novo review, it found by the greater weight of the evidence that Sivick was not an elected official and did not hold a position which, under or pursuant to the state law, was designated a "major nontenured policymaking or advisory position." The court stated that its determination of the appeal regarding employment effectively disposed of the appeal concerning monetary eligibility. Accordingly, the court affirmed the decisions of the appeal tribunal in both matters.

The Commissioner timely appealed, and we moved the case to our docket under our statutory authority to regulate the caseloads of the appellate courts of this state.[9]

ASSIGNMENTS OF ERROR

The Commissioner assigns, consolidated, restated, and reordered, that the district court erred by (1) failing to find that the position of county attorney is a major nontenured advisory position; (2) failing to find Sivick to be an elected official; (3) failing to apply the proper burden of proof, which should have been imposed upon Sivick to show that he was eligible for and not disqualified from benefits; and (4) disposing of, without analysis, the argument that Sivick was not monetarily eligible for unemployment insurance benefits under Neb. Rev. Stat. § 48-627 (Cum. Supp. 2008) on the basis of

[9] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

its determinations that Sivick was not excluded from benefits under § 48-604(6)(f).

STANDARD OF REVIEW

[4] In an appeal from the appeal tribunal to the district court regarding unemployment benefits, the district court conducts the review de novo on the record, but on review by the Court of Appeals or the Supreme Court, the judgment of the district court may be reversed, vacated, or modified for errors appearing on the record. When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[10]

[5] Concerning questions of law and statutory interpretation, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[11]

ANALYSIS

Designated Under or Pursuant to Law as Major Nontenured Advisory Position

[6] Services performed for a political subdivision "in a position which, under or pursuant to the state law, is designated a major nontenured policymaking or advisory position" are excluded from the definition of "employment" under the Employment Security Law.[12] There is no dispute that Sivick's position was nontenured, and the Commissioner does not contend that the position was a policymaking one. Thus, the dispute centers on whether it was, under or pursuant to Nebraska law, designated a "major advisory position."

[7] We begin by examining the plain and ordinary meaning of the words "major" and "advisory." Absent a statutory

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[10] *Meyers v. Nebraska State Penitentiary*, 280 Neb. 958, 791 N.W.2d 607 (2010).

[11] *Estate of Teague v. Crossroads Co-op Assn.*, 286 Neb. 1, 834 N.W.2d 236 (2013).

[12] § 48-604(6)(f)(v).

indication to the contrary, words in a statute will be given their ordinary meaning.[13] "Major" has been defined as "greater, as in size, amount, extent, importance, rank, etc."[14] An alternative definition is "great, as in rank or importance."[15] "Advisory" is defined as "of, giving, or containing advice" or "having the power or duty to advise."[16]

The Commissioner asserts that Sivick's position was "major" because he was "the highest-ranking official in Howard County in the area of law."[17] And because Sivick's employment contracts specified that he was to provide advice to the Board, the Commissioner contends that he held an advisory position. The Commissioner argues that the court "should have considered the actuality of Sivick's job as County Attorney, examining related statutes and evidence, in order to interpret 'major nontenured advisory.'"[18]

The district court, on the other hand, focused on the statutory phrase requiring that the designation be made "under or pursuant to the state law."[19] The court focused on § 23-1201 and found no "designation that the office of county attorney position is a major policymaking or advisory position." The court also stated that it was "pointed to no other law, and found no other designation, that Sivick's position was designated a major nontenured policymaking or advisory position by the Legislature, statute, regulation, executive order or the like." To the extent that the district court was rejecting the Commissioner's invitation to examine the terms of Sivick's contract, we agree. The designation must be found in state law.

But we disagree with two aspects of the district court's analysis. First, the court restricted its examination of the duties of

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[13] *Caniglia v. Caniglia*, 285 Neb. 930, 830 N.W.2d 207 (2013).

[14] Webster's Encyclopedic Unabridged Dictionary of the English Language 865 (1989).

[15] *Id.*

[16] *Id.* at 22.

[17] Brief for appellant at 20.

[18] *Id.* at 30.

[19] § 48-604(6)(f)(v).

a county attorney to § 23-1201. As we expound below, there are other statutes expressly imposing advisory duties. Second, the court's language suggests that it focused on the absence of a specific designation using the precise words of the statute. In other words, the court apparently reasoned that because the Legislature did not use the words "major," "nontenured," and "advisory" in describing the position of county attorney, the statute did not designate the county attorney as such.

[8] Under Nebraska statutes, an important function of a county attorney is to provide advice. The county attorney shall give advice to the board of county commissioners and other civil officers of their respective counties.[20] The county attorney serves as the legal advisor to the county airport authority[21] and for the preservation, restoration, and development board for federal forts.[22] Further, the officer of consolidated counties can call upon the county attorney for legal advice.[23] The county attorney also has the duty to give advice to a grand jury on any legal matter.[24] Clearly, under these statutes, the county attorney is the chief legal advisor. Thus, these statutes show that the position of county attorney is both an advisory and a major position. While we concede that the giving of advice is not a county attorney's only function and in some counties may not be the predominant one, it clearly is a statutory duty of great importance, significance, and seriousness.

Other jurisdictions similarly look to the duties of the position in question in determining whether a job is a major nontenured policymaking or advisory position. In Kentucky, which has similar statutory language,[25] an appellate court concluded that

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[20] Neb. Rev. Stat. § 23-1203 (Reissue 2012).

[21] Neb. Rev. Stat. § 3-613(6) (Reissue 2012).

[22] Neb. Rev. Stat. § 72-418 (Reissue 2009).

[23] Neb. Rev. Stat. § 22-415 (Reissue 2012).

[24] Neb. Rev. Stat. §§ 23-1208 (Reissue 2012) and 29-1408 (Reissue 2008).

[25] Ky. Rev. Stat. Ann. § 341.055(4)(f) (LexisNexis 2011) ("[i]n a position which, under or pursuant to the state law is designated as a major nontenured policymaking or advisory position").

the key consideration is whether the claimants' job duties were major policymaking or advisory.[26] Similarly, a New York court, in determining whether a county attorney was employed in a major nontenured policymaking or advisory position, looked to the attorney's duties and stated, "In view of these responsibilities, we find that substantial evidence supports the Board's finding that claimant was not engaged in covered employment necessary to qualify for benefits."[27] A Florida court likewise looked at a claimant's job duties to determine whether he was in a policymaking or advisory position.[28]

Although two states have rejected the idea that job duties are the determinative factor, we do not find their reasoning compelling. In Minnesota, an appellate court was not persuaded by an argument that the duties of the position were more important than the position itself.[29] The court stated that the word "position" in the statutory language "'in a *position* with the state of Minnesota which is a major nontenured policymaking or advisory *position* in the unclassified service'" was critical.[30] And a Pennsylvania court specifically stated that "the statutory description of job duties does not amount to a designation pursuant to the laws of this Commonwealth that the job is a major nontenured policymaking or advisory position."[31]

[9,10] We reject the notion that "magic words" are necessary for a position to be designated "a major nontenured

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[26] See *Com., Dept. of Educ. v. Com.*, 798 S.W.2d 464 (Ky. App. 1990).

[27] *Matter of Malgieri*, 219 A.D.2d 751, 752, 631 N.Y.S.2d 85, 85-86 (1995). See, also, *Claim of Richman*, 254 A.D.2d 673, 679 N.Y.S.2d 197 (1998) (finding attorney ineligible to receive unemployment insurance because he was employed in major nontenured policymaking or advisory position based upon his duties).

[28] *Brenner v. Florida Unemployment Appeals*, 929 So. 2d 630 (Fla. App. 2006).

[29] See *Ginsberg v. Dept. of Jobs and Training*, 481 N.W.2d 138 (Minn. App. 1992).

[30] *Id.* at 143.

[31] *Odato v. Unemployment Compensation Bd.*, 805 A.2d 660, 663 (Pa. Commw. 2002).

policymaking or advisory position." First, no statute uses the specific words in this way. In other words, there is no instance where the Legislature has described an office or position using the specific words of § 48-604(6)(f)(v). Even where positions of state executive branch advisors or policymakers are involved, the statute does not designate them using this specific terminology.[32] Thus, the Legislature has created such positions by defining their duties. Second, we agree with a Pennsylvania court that in determining whether a position is a major nontenured policymaking or advisory position, "[i]t is enough that a statute, regulation, executive order, or the like communicate the concept that the position is policymaking or advisory."[33] In that case, the appellate court reasoned that an examination of the relevant charter provisions revealed language which reached the level of an official designation of the position as a major policymaking or advisory one.[34] The court observed that under the charter, the heads of all departments were empowered to prescribe rules for their internal government and that each department had the authority to make reasonable regulations as necessary and appropriate in the performance of its duties under the charter or under any statute or ordinance.[35] Similarly, the Nebraska statutes cited above show that the county attorney is an advisory position. And because a county attorney is the chief legal advisor for a county, it is a major position.

Sivick advances three reasons in support of the district court's analysis. First, he argues that under the Commissioner's approach, any government employee appointed to a position who has some advisory duties would likely fit the exclusion. Second, he argues that the very nature of being a lawyer requires providing advice and that, thus, all lawyers employed by political subdivisions would be excluded. Finally, he relies

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[32] See, e.g., Neb. Rev. Stat. § 84-133 (Reissue 2008).

[33] *Philadelphia v. Unemp Comp. Bd. of Rev.*, 164 Pa. Commw. 624, 627, 643 A.2d 1158, 1159 (1994).

[34] *Philadelphia v. Unemp Comp. Bd. of Rev.*, *supra* note 33.

[35] *Id.*

upon the principle of liberal construction of the Employment Security Law.[36]

[11] None of Sivick's arguments hold up under scrutiny. His first and second arguments ignore the significance of the word "major." Neither the government employee whose duties include giving advice nor the lawyer employed by a political subdivision in a subordinate position could be fairly characterized as a "major" advisor. A county attorney, on the other hand, is the chief legal advisor for the county and, by the duties imposed by statute, has the high standing and significance attributable to a "major" officer. Regarding Sivick's third argument, we agree that the Employment Security Law should be liberally construed. But a statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning.[37] We cannot, in the guise of liberal construction, disregard the plain meaning of the exclusion of § 48-604(6)(f)(v).

Accordingly, we conclude that Sivick's services were performed in the exercise of his duties in a position excepted from the definition of employment by § 48-604(6)(f)(v). Therefore, his wages were not for covered employment and he was not entitled to unemployment insurance benefits. The district court's judgment does not conform to the law and must be reversed.

Remaining Assignments of Error

[12] Because we have concluded that Sivick is not entitled to unemployment insurance benefits and that the district court's judgment must be reversed, we do not consider the Commissioner's other assignments of error. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[38] We merely

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[36] See *Wadkins v. Lecuona*, 274 Neb. 352, 740 N.W.2d 34 (2007).

[37] *State ex rel. Wagner v. Gilbane Bldg. Co.*, 276 Neb. 686, 757 N.W.2d 194 (2008).

[38] *Holdsworth v. Greenwood Farmers Co-op*, 286 Neb. 49, 835 N.W.2d 30 (2013).

observe in passing that closer legislative attention to the term "elected official" in § 48-604(6)(f)(i) might have eliminated the necessity of litigation.[39]

CONCLUSION

Because an important part of the statutory duties of a county attorney is advisory in nature, we conclude that Sivick was in a position that had been designated under or pursuant to Nebraska law as a "major nontenured policymaking or advisory position." Thus, the services Sivick performed in his position were excepted from the definition of employment, and he was monetarily ineligible for unemployment insurance benefits because his wages were not for covered "employment." We therefore reverse the judgment of the district court.

REVERSED.

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[39] See, e.g., Neb. Rev. Stat. § 49-1417 (Reissue 2010) (defining "[e]lective office" to include "[a] person who is appointed to fill a vacancy in a public office which is ordinarily elective"); Neb. Rev. Stat. § 23-2535(8) (Reissue 2012) (defining "official" as "an officer elected by the popular vote of the people or a person appointed to a countywide office"); Alaska Stat. § 23.20.526(d)(8)(A) (2004) (excepting from employment service performed as "a person hired or appointed as the head or deputy head of a department in the executive branch"); S.C. Code Ann. § 41-27-260(5)(a) (Cum. Supp. 2011) (excepting individual performing duties as "an elected official or as the appointed successor of an elected official"); Wis. Stat. Ann. § 108.02(15)(f)(1) and (2) (West Cum. Supp. 2013) (excepting service "[a]s an official elected by vote of the public" or "[a]s an official appointed to fill part or all of the unexpired term of a vacant position normally otherwise filled by vote of the public").

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. LENNOX J. SIMON, RESPONDENT.

841 N.W.2d 199

Filed December 20, 2013. No. S-13-726.

Original action. Judgment of disbarment.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

PER CURIAM.

INTRODUCTION

The District of Columbia Court of Appeals disbarred respondent, Lennox J. Simon. The Counsel for Discipline of the Nebraska Supreme Court, relator, filed a motion for reciprocal discipline against respondent. We grant the motion for reciprocal discipline and impose the same discipline as the District of Columbia Court of Appeals.

FACTS

Respondent was admitted to the practice of law in the State of Nebraska on May 17, 1985. Respondent was also admitted to the practice of law in the District of Columbia. On June 28, 2013, respondent was suspended from the practice of law in the State of Nebraska for nonpayment of his Nebraska State Bar Association dues. Respondent had been an inactive member of the Nebraska bar for many years prior to his suspension.

On August 1, 2013, the District of Columbia Court of Appeals issued an order which disbarred respondent. See *In re Simon*, 73 A.3d 107 (D.C. 2013). Respondent's case before the District of Columbia Court of Appeals generally involved his misappropriation of funds from the estate of an incapacitated person.

On August 22, 2013, relator filed a motion for reciprocal discipline pursuant to Neb. Ct. R. § 3-321 of the disciplinary rules. On August 28, we filed an order to show cause as to why we should not impose reciprocal discipline. Respondent did not respond to the order to show cause. On September 23,

relator filed a response to the order to show cause, in which relator requested that we impose the same discipline as the District of Columbia Court of Appeals and enter an order disbarring respondent from the practice of law in the State of Nebraska. Relator also noted that respondent failed to respond to the order to show cause and to make a showing as to why he should not be disbarred.

ANALYSIS

The basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances. *State ex rel. Counsel for Dis. v. Kleinsmith*, 285 Neb. 312, 826 N.W.2d 860 (2013). In a reciprocal discipline proceeding, a judicial determination of attorney misconduct in one jurisdiction is generally conclusive proof of guilt and is not subject to relitigation in the second jurisdiction. *Id.* Based on the record before us, we find that respondent has engaged in misconduct.

Neb. Ct. R. § 3-304 of the disciplinary rules provides that the following may be considered as discipline for attorney misconduct:

> (A) Misconduct shall be grounds for:
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> (1) Disbarment by the Court; or
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> (2) Suspension by the Court; or
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> (3) Probation by the Court in lieu of or subsequent to suspension, on such terms as the Court may designate; or
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> (4) Censure and reprimand by the Court; or
>
> (5) Temporary suspension by the Court; or
>
> (6) Private reprimand by the Committee on Inquiry or Disciplinary Review Board.
>
> (B) The Court may, in its discretion, impose one or more of the disciplinary sanctions set forth above.

Section 3-321 of the disciplinary rules provides in part:

> (A) Upon being disciplined in another jurisdiction, a member shall promptly inform the Counsel for Discipline of the discipline imposed. Upon receipt by the Court of appropriate notice that a member has been disciplined in another jurisdiction, the Court may enter an order

> imposing the identical discipline, or greater or lesser discipline as the Court deems appropriate, or, in its discretion, suspend the member pending the imposition of final discipline in such other jurisdiction.

In imposing attorney discipline, we evaluate each case in light of its particular facts and circumstances. *State ex rel. Counsel for Dis. v. Walocha*, 283 Neb. 474, 811 N.W.2d 174 (2012). Respondent did not respond to the order to show cause filed on August 28, 2013, as to why we should or should not enter an order imposing the identical or greater or lesser discipline as imposed by the District of Columbia Court of Appeals, as we deem appropriate.

The order of the District of Columbia Court of Appeals disbarred respondent. Our record includes a "Report and Recommendation of the Board on Professional Responsibility," which found that respondent's misappropriation of funds was "reckless." The foregoing report was supported by an additional 42-page report entitled "Report and Recommendation of the Ad Hoc Hearing Committee," which described respondent's misconduct in detail. We take the determination of misconduct as found in *In re Simon*, 73 A.3d 107 (D.C. 2013), to be established herein. Accordingly, we grant the motion for reciprocal discipline and enter a judgment of disbarment.

CONCLUSION

The motion for reciprocal discipline is granted. It is the judgment of this court that respondent should be and is disbarred. Respondent shall forthwith comply with all terms of Neb. Ct. R. § 3-316 of the disciplinary rules, and upon failure to do so, he shall be subject to punishment for contempt of this court. Respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and Neb. Ct. R. §§ 3-310(P) and 3-323(B) of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by this court.

JUDGMENT OF DISBARMENT.

STATE OF NEBRASKA, APPELLEE, V. NATHAN J. BRAUER, APPELLANT.

841 N.W.2d 201

Filed December 27, 2013. No. S-12-1169.

1. **Trial: Convictions.** An appellate court will sustain a conviction in a bench trial of a criminal case if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support that conviction.
2. **Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented, which are within a fact finder's province for disposition. Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
3. **Sexual Assault: Proof.** Whether there is sufficient evidence to prove sexual arousal or gratification (which, by necessity, must generally be inferred from the surrounding circumstances), is extraordinarily fact driven.

Appeal from the District Court for Cheyenne County: DEREK C. WEIMER, Judge. Affirmed.

Maren Lynn Chaloupka, of Chaloupka, Holyoke, Snyder, Chaloupka, Longoria & Kishiyama, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

CONNOLLY, J.

SUMMARY

Following a bench trial, the district court found Nathan J. Brauer guilty of sexually assaulting a child in the third degree.[1] The record shows that Brauer poked a child in the penis, over his clothes, using two fingers. The touch was brief, and it happened a single time. The sole issue on appeal is whether there was sufficient evidence to conclude beyond a reasonable doubt that Brauer's touch was "sexual contact,"

[1] Neb. Rev. Stat. § 28-320.01 (Reissue 2008).

which is limited to conduct that can be "reasonably construed as being for the purpose of sexual arousal or gratification."[2] Although some facts suggest an innocent explanation, there are sufficient other facts—most notably, Brauer's incriminating statements to law enforcement—which support the court's finding. We affirm.

BACKGROUND

Factual and Procedural History

Jeremy N. and Danae N. were long-time friends with Brauer. In the spring or early summer of 2011, Jeremy and Danae asked Brauer (who was not employed at the time) if he would like to watch their children, D.N. (about a year old) and J.N. (4 years old). Brauer agreed to do so, though the arrangement lasted only through June; at that point, Jeremy and Danae no longer needed Brauer to babysit their children.

During or soon after that time, J.N. made statements or asked questions that concerned Jeremy and Danae. At one point, while Jeremy and Danae were watching television, J.N. "turned around and . . . said, mommy, daddy nobody is supposed to touch your butt or peenie, right?" Jeremy and Danae told him that "no, nobody is ever supposed to touch you. And [J.N.] let it go from there." Several weeks later, Brauer came by the house to see Jeremy's new camper, and J.N. told Jeremy that Brauer "made him feel funny, made him feel that [Brauer] wanted to touch [J.N.'s] butt or his peenie." After that, Jeremy and Danae did not allow Brauer to see J.N., though Brauer still came around the house.

During this time and into the early fall, Danae felt that there was something wrong with J.N. but she could not tell what it was. Doreen Schaub, J.N.'s daycare provider, had also noticed changes in J.N.'s behavior and was worried about him. On September 29, 2011, while at the daycare, Danae asked Schaub to help her try to discover what was wrong with J.N. Danae and Schaub met with J.N., and Danae asked him whether there was something wrong, and J.N. said no. Danae mentioned Brauer's name, and J.N. said that Brauer had not done anything

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[2] Neb. Rev. Stat. § 28-318(5) (Cum. Supp. 2012).

to him. Schaub told J.N. that he had to tell the truth, and then J.N. said that Brauer had touched his "peepee." At that point, Danae became hysterical, and Schaub called Danae's mother to come to the daycare. Danae's mother called law enforcement, and an officer arrived shortly thereafter. The officer arranged for J.N. to be interviewed at 7:30 that night.

Lt. Keith A. Andrew, of the Sidney Police Department, an investigator in crimes against children, interviewed J.N. that night. Much of the interview consisted of Andrew's attempting to build a rapport with J.N. They discussed J.N.'s family, and Andrew emphasized that J.N. had done nothing wrong. At the beginning of the interview, Andrew tested J.N. to be sure that J.N. understood the difference between a truth and a lie. In the middle of the interview, Andrew had J.N. look at textbook pictures of a boy and of a man and identify what he called each of their parts. Andrew did this because "some children will identify like their penis or their groin area with multiple names[,] so we want to make sure that when they are telling us about their peenie or whatever that is[,] we know what part they are talking about."

Eventually, J.N. asked whether Brauer was in trouble, identified Brauer as his dad's "buddy," and explained that Brauer used to babysit J.N. In response to Andrew's questions, J.N. explained that Brauer had touched J.N.'s "peenie," but not his "bottom." J.N. explained that it had happened at Brauer's house, in the living room, after they had watched a movie. J.N. showed Andrew how Brauer had touched him, indicating that it was a two-finger tap or poke to his penis. J.N. consistently maintained that the touch happened only once and that he had all of his clothes on when it happened. J.N. said that he told Brauer "don't do that ever again" and Brauer apologized. Throughout the interview, J.N. was cheerful, cooperative, and unafraid.

Toward the end of October 2011, Andrew visited Brauer at his workplace. Andrew informed Brauer of the allegations, which Brauer denied. Andrew "asked him if there was ever any time he had touched [J.N.'s] penis area for any reason[,] including playing[,] and he said absolutely not." Andrew asked Brauer whether he would meet with him for some followup

questions; Brauer agreed, and Andrew arranged for Brauer to come to the Nebraska State Patrol office for an interview on November 8.

During that interview, Brauer initially denied ever touching J.N. but eventually acknowledged the touch described above. Though Brauer denied ever having any explicit sexual contact (such as penetration or masturbation) with J.N., he did make several incriminating statements, which will be set forth in detail below. Law enforcement released Brauer following the interview, but arrested him a few hours later.

The Trial

The State charged Brauer with sexually assaulting a child in the third degree. Brauer waived his right to a jury trial and elected to proceed with a bench trial. At trial, J.N., along with his parents, his daycare provider, and the various law enforcement officers involved in the investigation (chiefly, Andrew) testified to the above facts. J.N. also related a host of additional allegations which he had never expressed before in his interview with Andrew or (presumably) to his parents. For example, J.N. testified that Brauer "dragged" J.N. into the bathroom and locked him in there, that the touch occurred in the bathroom, and that Brauer used his "whole hand."

The Court's Order

Based on the trial court's opinion, the court gave no credence to J.N.'s additional allegations at trial, but the court did find Brauer guilty. The court made extensive factual findings, including that the touch was a two-finger touch or poke, that it occurred over J.N.'s clothes, and that it was brief and occurred only once. The court noted that the only contested element of the crime was "whether the State submitted sufficient evidence to prove beyond a reasonable doubt that [Brauer's] touching of [J.N.] was 'sexual contact' as that term is defined in the law." Brauer's touching of J.N. could be "sexual contact" only if it could be "reasonably construed as being for the purpose of sexual arousal or gratification of either party."[3]

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[3] *Id.*

In finding that the State had proved sexual contact, the court emphasized a number of facts. The court noted that, at first, Brauer persistently denied any contact with J.N., then said "maybe he got close once when he picked [J.N.] up when they were wrestling around," and then eventually admitted to touching J.N. The court also noted that Brauer apologized immediately to J.N. and that during Brauer's interview with law enforcement, Brauer made suicidal statements. Viewed together, the court saw this as evidence of consciousness of guilt.

The court also emphasized the context around the touch. The court noted that Brauer acknowledged sharing "a kiss and hug of some kind with [J.N.] prior to the touching and that it made him feel really good," though the court acknowledged that Brauer said that it made him feel good mentally, but not sexually. The court noted that the touch occurred when Brauer was alone and unsupervised with J.N. And the court noted that, based on J.N.'s behavioral changes, "[t]his incident was obviously weighing on [J.N.]" Finally, the court emphasized Brauer's incriminating statements during his interview with Andrew, which the court characterized as "admissions."

After rendering its verdict, the court sentenced Brauer to 2 to 3 years in prison.

ASSIGNMENT OF ERROR

Brauer assigns, restated, that the district court erred in finding that the State had proved beyond a reasonable doubt that Brauer's touch was "sexual contact."

STANDARD OF REVIEW

[1,2] We will sustain a conviction in a bench trial of a criminal case if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support that conviction.[4] In making this determination, we do not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence

[4] See *State v. Lamb*, 280 Neb. 738, 789 N.W.2d 918 (2010).

presented, which are within a fact finder's province for disposition.[5] Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[6]

ANALYSIS

Brauer's argument is simple: He argues that the evidence was insufficient to support the verdict. Specifically, Brauer argues that the evidence was insufficient to show, beyond a reasonable doubt, that Brauer's touching J.N. was "sexual contact," which is limited to conduct which can be "reasonably construed as being for the purpose of [Brauer's] sexual arousal or gratification" under § 28-318(5). In support of his argument, Brauer argues, among other things, that the touch was minor, fleeting, and over the clothes, and that there were no "indicia of sexual arousal."[7]

We recently addressed the same issue, though in a different context, in *State v. Osborne*.[8] There, we referenced the Nebraska Court of Appeals' opinion detailing the underlying facts and then concluded that affirmance was proper after "having reviewed the briefs and record and having heard oral arguments, *and considering the relevant standard of review*."[9] This case presents different and, qualitatively speaking, weaker facts than *Osborne*; but we do not bring up *Osborne* to compare facts. Its relevance here, beyond presenting the same issue, is as a recent example of the role the standard of review plays in criminal cases at the appellate level.

There is an appellate maxim that "standards of review can be a party's best friend or they can be a party's worst enemy." That maxim rings true today, and to Brauer's detriment. The record could very well support inferences other than those drawn by the trial court. But under our standard of review, we

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[5] See *id.*

[6] See *id.*

[7] Brief for appellant at 22.

[8] *State v. Osborne*, 286 Neb. 154, 835 N.W.2d 664 (2013).

[9] *Id.* at 156-57, 835 N.W.2d at 666 (emphasis supplied).

do not resolve conflicts in the evidence, reweigh the evidence, assess witness credibility, or evaluate explanations. Instead, we ask only whether—viewing the evidence in the light most favorable to the prosecution—any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. It could.

The State charged Brauer with sexually assaulting a child in the third degree. Section 28-320.01(1) explains that "[a] person commits sexual assault of a child in the second or third degree if he or she subjects another person fourteen years of age or younger to sexual contact and the actor is at least nineteen years of age or older." The crime is in the third degree if the "actor does not cause serious personal injury to the victim,"[10] which is the case here.

Because the ages of the relevant persons were undisputed, as was the existence of the touch itself, the only issue was whether the touch was "sexual contact" under § 28-318(5). Brauer did not dispute that he intentionally touched J.N.'s "clothing covering the immediate area of [J.N.'s] sexual or intimate parts." The only question was whether Brauer's touch could be "reasonably construed as being for the purpose of [Brauer's] sexual arousal or gratification." After reviewing the record, we conclude that there was sufficient evidence to support the trial court's finding beyond a reasonable doubt that Brauer's touch was "sexual contact."

As noted by the trial court, Brauer initially (and persistently) denied ever touching J.N. in or around his crotch for any reason, even accidentally. Then, when confronted by law enforcement officers, he admitted that he "had come in contact with [J.N.] on the upper leg area in the vicinity of the genitals." And during his interview with Andrew, Brauer eventually admitted that he had "poked" J.N. in the penis. The transcript of Brauer's interview with Andrew also reveals that Brauer contemplated suicide (though he assured Andrew he was not going to follow through), making statements like, "I'm going to go blow my head off." Brauer's initial refusal to acknowledge the touch until repeatedly confronted by law enforcement

[10] § 28-320.01(3).

officers, along with his clear understanding that what he had done was wrong, could allow the trial court to conclude that this was more than simply an innocent touch.

Other facts also support concluding that Brauer touched J.N. for the purpose of sexual arousal or gratification. Brauer acknowledged that, with Jeremy and Danae present, he had shared "a kiss and hug of some kind with [J.N.] prior to the touching and that it made him feel really good," though Brauer said it made him feel good mentally, not sexually. In speaking with one investigator, Brauer said the kiss made him feel a "spark." Most damning, however, are Brauer's statements during Andrew's interview with Brauer describing his touching J.N. We set out the critical part of the interview below:

> LT. KEITH ANDREW: Okay. Tell me what — show me what happened. If this is his groin area, how did you touch him? Say this is — this is his groin area. It's my knee, okay. I'm not big into touches, but go ahead and show me one time. Show me how it happened.
>
> NATHAN BRAUER: Oh, my God.
>
> LT. KEITH ANDREW: What?
>
> NATHAN BRAUER: I poked him like that.
>
> LT. KEITH ANDREW: Okay. With two fingers?
>
> NATHAN BRAUER: Two fingers. I just poked him like that. Oh.
>
> LT. KEITH ANDREW: And then you stopped; right?
>
> NATHAN BRAUER: Yeah, because he came flying up to me just to jump on me to give me a hug, and he hit me in the nuts. So my reaction was, [J.N.], no, and then I poked him in the nuts. And I thought, what the — oh, okay, sorry, [J.N.]
>
> LT. KEITH ANDREW: Okay. Because you knew that feeling. You were like, stop, don't let this get carried away?
>
> NATHAN BRAUER: Yeah.
>
> LT. KEITH ANDREW: Because you care for him? Okay. But there was something sexual that kicked in when you did that?

NATHAN BRAUER: Well, I wouldn't really say sexual. I mean, it just kind of hurt me in a way, I guess.

LT. KEITH ANDREW: Okay.

NATHAN BRAUER: But when I hit him in the nuts, it's like, oh, my God, that's . . .

LT. KEITH ANDREW: So it gave you a spark, for lack of a better term?

NATHAN BRAUER: A spark to never do it again.

LT. KEITH ANDREW: A charge? Okay.

NATHAN BRAUER: It — no. It just kind of give me that hit like, oh, okay, I just fucked up.

LT. KEITH ANDREW: This is wrong, never do this again?

NATHAN BRAUER: Yeah.

LT. KEITH ANDREW: You don't do this to kids?

NATHAN BRAUER: No.

LT. KEITH ANDREW: Okay.

NATHAN BRAUER: You do not do that to kids.

LT. KEITH ANDREW: So it was kind of a sexual — had a sexual connotation to it and — but you —

NATHAN BRAUER: Well . . .

LT. KEITH ANDREW: — checked it and stopped?

NATHAN BRAUER: Yeah. I mean, I wouldn't say, like, it got my dick hard or made me, like, you know throb up with it, but it just made me, you know . . .

LT. KEITH ANDREW: Maybe like an adrenaline-type rush?

NATHAN BRAUER: Yeah.

LT. KEITH ANDREW: Like a — like a release of some hormone that had a sexual connotation to it?

NATHAN BRAUER: Well, it probably was a little bit of that because I got racked, and I wanted to tell him basically don't do this.

LT. KEITH ANDREW: Okay. Okay. So how many times did this happen? One time?

NATHAN BRAUER: One time.

LT. KEITH ANDREW: Happened one time. Did [J.N.] say anything to you?

NATHAN BRAUER: That hurt.

LT. KEITH ANDREW: Okay.

NATHAN BRAUER: And so I said, I'm like, sorry, [J.N.]

LT. KEITH ANDREW: Okay. And did he tell you to — anything else after that? How about something to the effect, don't ever do that again?

NATHAN BRAUER: Yeah.

LT. KEITH ANDREW: Did he tell you that? Do you remember that?

NATHAN BRAUER: I think so. I can't really . . .

LT. KEITH ANDREW: Something? He said something along that lines [sic]? You don't remember the exact terminology; is that right?

NATHAN BRAUER: I don't remember.

LT. KEITH ANDREW: Okay. Okay.

NATHAN BRAUER: I mean, I remember . . .

LT. KEITH ANDREW: So let me make sure I have this right, okay? I want to make sure I'm understanding everything because I don't want to misconstrue anything . . . okay? So I'm going to kind of regurgitate what you've told me.

NATHAN BRAUER: Yeah.

LT. KEITH ANDREW: And if there's a correction to be made, tell me.

NATHAN BRAUER: Okay.

. . . .

LT. KEITH ANDREW: Okay. So he was — you guys were playing. He hit you in your groin, which caused you some pain.

NATHAN BRAUER: Oh, yeah.

LT. KEITH ANDREW: Okay.

NATHAN BRAUER: Oh, yeah.

LT. KEITH ANDREW: We've all been there. We know that hurts, okay.

NATHAN BRAUER: Yeah. Yeah.

LT. KEITH ANDREW: And you went like — you used two fingers like this.

NATHAN BRAUER: Uh-huh.

LT. KEITH ANDREW: You went like that to his groin.

NATHAN BRAUER: Uh-huh.

LT. KEITH ANDREW: And . . .

NATHAN BRAUER: Just to pretty much tell him, hey, that hurts, don't do that.

LT. KEITH ANDREW: Okay. And when you did that, there was a — some kind of impulse.

NATHAN BRAUER: Yeah. Yeah.

LT. KEITH ANDREW: The thrill of some kind of sexual . . .

NATHAN BRAUER: I wouldn't really say sexual really, but there was an impulse.

LT. KEITH ANDREW: Okay.

NATHAN BRAUER: I'm just . . .

LT. KEITH ANDREW: And then you did the right thing. You said, I'm never . . .

NATHAN BRAUER: Oh, I fucked up, sorry.

LT. KEITH ANDREW: I'm — I screwed up, the — going through your head, I will never do this again, because you don't like kids. I mean, you like kids, but you don't have a preference for kids.

NATHAN BRAUER: There we go, yeah.

LT. KEITH ANDREW: A sexual preference for kids.

NATHAN BRAUER: Yeah.

LT. KEITH ANDREW: Is that fair?

NATHAN BRAUER: Yeah, that's fair.

LT. KEITH ANDREW: Okay. So it happened once. You touched him there. There was a — some kind of sexual urge, not an erection.

NATHAN BRAUER: No, never an erection.

LT. KEITH ANDREW: Okay. But a sexual release of hormones, I guess is a better . . .

NATHAN BRAUER: Yeah, it was . . .

LT. KEITH ANDREW: Is that right?

NATHAN BRAUER: Yeah. It was just a release.

LT. KEITH ANDREW: That's how I'm understanding it.

NATHAN BRAUER: It must have been a release of hormones.

LT. KEITH ANDREW: And then you did the right thing. And right after it happened you were like, I'm never doing this again. I'm not going to touch him. He's my family. He's a little boy. And you've checked it since then.

NATHAN BRAUER: Yeah.

LT. KEITH ANDREW: And you haven't done this since?

NATHAN BRAUER: Nope.

LT. KEITH ANDREW: Are you ever going to do that again?

NATHAN BRAUER: Fuck no.

Although Brauer does not endorse the "sexual" modifier, he variously describes having experienced an "adrenaline-type rush," "impulse," and a "release of hormones" from the touch. Brauer made these statements knowing there were allegations that he had touched J.N. with a sexual purpose. We agree with the district court that these statements constitute admissions that Brauer's touch was for the purpose of his sexual arousal or gratification. Viewed as a whole, the record presents sufficient evidence for the fact finder to have found Brauer guilty, beyond a reasonable doubt, of sexually assaulting J.N.

But Brauer points out that there was an innocent explanation for the touch: J.N. had been going through a phase of hitting men in the crotch, and when J.N. hit Brauer in the crotch, Brauer's subsequent touch was a hasty (and ill-advised) reaction, but not sexual in any way. Under our standard of review, however, we do not reweigh evidence or evaluate explanations. And contrary to Brauer's assertion that it was undisputed J.N. had hit Brauer in the crotch before the touch, the district court found this explanation not credible because this "was not something [Brauer] had ever told anyone before" Andrew's interview and, particularly, because it was not something Brauer had ever told his friends Jeremy and Danae. We will not second-guess the district court's determinations in that regard.

Brauer also repeatedly emphasizes that this was a single poke, with two fingers, over J.N.'s clothes and that there was no stroking or fondling or, indeed, any additional movement of the hand or fingers. Brauer emphasizes that there was no evidence that Brauer got an erection, that he told J.N. to keep the touch secret, or that Brauer threatened J.N. And Brauer argues that there was no evidence that he removed his clothing, breathed heavily, or had any other observable signs of arousal. All of this is true; but it does not change the evidence that does exist, which is sufficient for the fact finder to have found Brauer guilty. Whether the district court "failed to weigh[] and act on [the] evidence cautiously"[11] is not something we evaluate; we do not reweigh the evidence.

Finally, Brauer points to several cases where courts have found insufficient evidence of sexual arousal or gratification. We find them materially distinguishable, in various ways. For example, in *In re Interest of Kyle O.*,[12] the Court of Appeals determined that "the State presented insufficient evidence to establish that 'sexual contact' occurred" between a 14-year-old and a 5-year-old. Putting aside the fact that *In re Interest of Kyle O.* involved two minors, the Court of Appeals (reviewing a juvenile case) also operated under a de novo standard of review,[13] a standard far more lenient than ours in this case.

In *State v. Powell*,[14] the Washington Court of Appeals found insufficient evidence of sexual gratification. There, the record showed that the defendant, well known to the child as "Uncle Harry," had hugged the child around her chest while she was seated on his lap.[15] As the defendant helped her off

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[11] Brief for appellant at 22.

[12] *In re Interest of Kyle O.*, 14 Neb. App. 61, 62, 703 N.W.2d 909, 911 (2005).

[13] See *In re Interest of Kyle O.*, *supra* note 12.

[14] *State v. Powell*, 62 Wash. App. 914, 816 P.2d 86 (1991).

[15] See *id.* at 916, 816 P.2d at 87.

his lap, he "placed his hand on her 'front' and bottom on her underpanties under her skirt."[16] And, on another occasion, while the defendant and the child were waiting for the child's cousin in the defendant's truck, the defendant had "touched both her thighs."[17]

The Washington Court of Appeals reversed, concluding that the defendant's "purpose in both touchings [was] equivocal."[18] The court emphasized several factors, including that the touches were susceptible to innocent explanations, that the child was clothed on each occasion, that the touches occurred on the outside of the clothes, and that the defendant made no threats, bribes, or requests not to tell.[19] Finally, the defendant acknowledged that he might have hugged and touched her, but "[h]e denied ever touching [the child] under her skirt or touching her for sexual gratification."[20] We find this case distinguishable, primarily because of Brauer's statements to Andrew, set forth above, which we (like the district court) view as incriminating admissions.

[3] Brauer cites several other cases as examples of courts having found insufficient evidence of sexual arousal or gratification.[21] We find them distinguishable, and we see no need to recite each of them here. It suffices to say that what those cases demonstrate, along with others we have uncovered, is a simple truth: Whether there is sufficient evidence to prove sexual arousal or gratification (which, by necessity, must generally be inferred from the surrounding circumstances)[22] is extraordinarily fact driven. The facts in this case, considering

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[16] *Id.*

[17] *Id.*

[18] *Id.* at 917, 816 P.2d at 88.

[19] See *Powell*, *supra* note 14.

[20] *Id.* at 918, 816 P.2d at 88.

[21] See, e.g., *In re Matthew K.*, 355 Ill. App. 3d 652, 823 N.E.2d 252, 291 Ill. Dec. 242 (2005); *People v. Guerra*, 178 A.D.2d 434, 577 N.Y.S.2d 296 (1991); *State v. Brown*, 586 A.2d 1085 (R.I. 1991); *McKeon v. Commonwealth*, 211 Va. 24, 175 S.E.2d 282 (1970).

[22] See *In re Interest of Kyle O.*, *supra* note 12.

our standard of review, constitute sufficient evidence to support the verdict.

CONCLUSION

Finding sufficient evidence to support the verdict, we affirm.

AFFIRMED.

MILLER-LERMAN, J., dissenting.

I fully recognize the need to protect children, but given the evidence in the record, I respectfully dissent. Even viewing the evidence in a light most favorable to the State as we must, see *State v. Lamb*, 280 Neb. 738, 789 N.W.2d 918 (2010), and mindful of the limitations of our appellate standard of review as emphasized by the majority, I believe no reasonable finder of fact could find beyond a reasonable doubt on this record that the State established that Brauer's conduct of touching J.N. could be "reasonably construed as being for the purpose of [Brauer's] sexual arousal or gratification" under Neb. Rev. Stat. § 28-318(5)(Cum. Supp. 2012).

The undisputed facts of the incident giving rise to this case are recited by the district court and repeated by the majority. The district court found that the incident can be described as having "happened once, over clothes and involved two fingers." The district court states that "[t]he issue presented in this case is whether the State submitted sufficient evidence to prove beyond a reasonable doubt that [Brauer's] touching of [J.N.] was 'sexual contact' as that term is defined in the law."

The district court made a finding that 4-year-old J.N. had a "phase of striking men in the genital area." The district court further found there was "a list of people that had been hit in the genitals by [J.N.] during this 3-4 week 'phase' when he would do such a thing: . . . his father, his brother and . . . (a family friend) were referenced." Contrary to the majority, I do not read the district court's order as having found that J.N. did not hit Brauer in the crotch. To the contrary, the district court summarizes Brauer's testimony as follows: "J.N. struck [Brauer] in the genitals [and Brauer] wanted to show [J.N.] how that felt so he struck [J.N.] or poked him there to do so."

This case was tried to the court, and we have the advantage of particularized findings on which the verdict relies.

Even with our limited standard of review, we can look at the record to determine whether there is evidence in the record which supports the findings of fact. The district court found there was sexual conduct by Brauer based on "direct evidence in the form of the admissions" of Brauer to Lt. Keith Andrew. In particular, the district court found that Brauer "acknowledge[d] a release of hormones and/or adrenaline" after touching J.N., and it is this finding of fact which the district court characterizes as the admission that serves as the basis for the conviction. Indeed, the district court's emphasis on "hormones and/or adrenaline" is demonstrated by the district court's reference to this phrase three times in the opinion. Further, the district court equates—incorrectly in my view—hormones and adrenaline.

The district court quotes Brauer's interview with Lieutenant Andrew at length, but nowhere in the quote does Brauer use the word "adrenaline." And as both the district court and the majority note, although Lieutenant Andrew uses the word "sexual" a number of times when questioning Brauer, Brauer never adopts the term. So we cannot say that Brauer used the word "hormone" in the sense of a sex-specific hormone.

As for the word "adrenaline" on which the district court heavily relies, it is used once by Lieutenant Andrew in the lengthy interview and, as I read it, Brauer is describing the feeling he experienced when he got hit in the genitals, or its use is ambiguous, but it does not describe beyond a reasonable doubt the feelings he experienced as a result of touching J.N. In the passage, Lieutenant Andrew and Brauer are talking over each other rather than clearly engaging in a question-and-answer exchange. The passage which includes the critical word "adrenaline" reads as follows:

> LT. KEITH ANDREW: Maybe like an adrenaline-type rush?
>
> NATHAN BRAUER: Yeah.
>
> LT. KEITH ANDREW: Like a — like a release of some hormone that had a sexual connotation to it?
>
> NATHAN BRAUER: Well, it probably was a little bit of that because I got racked, and I wanted to tell him basically don't do this.

Even if we accept the finding of the district court that Brauer admitted he experienced an "adrenaline" rush as a result of touching J.N., such facts do not constitute proof that the touch was "for the purpose of sexual arousal or gratification." The key issue is not what sensation Brauer experienced after he touched the child, but, rather, what motivated him to touch J.N. in the first place. The only evidence of this is Brauer's statement that he was reacting to the child's striking him in the genitals in an effort to stop such conduct. Of course, the reaction was inappropriate and ill advised, but that does not mean that it was for the purpose of sexual arousal or gratification. In my view, there is no evidence in this record upon which a finder of fact could reasonably conclude beyond a reasonable doubt that Brauer touched the child for that purpose. His actions may have constituted negligent child abuse or some other offense, but not the offense of sexual assault with which he was charged.

WRIGHT and STEPHAN, JJ., join in this dissent.

JOHN JACOBITZ, APPELLEE, V.
AURORA COOPERATIVE, APPELLANT.
841 N.W.2d 377

Filed December 27, 2013. No. S-13-091.

1. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
2. **Judgments: Jurisdiction.** A jurisdictional issue that does not involve a factual dispute presents a question of law.
3. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, the party must be appealing from a final order or a judgment.
4. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), an appellate court may review three types of final orders: (1) an order that affects a substantial right and that determines the action and prevents a judgment, (2) an order that affects a substantial right made during a special proceeding, and (3) an order that affects a substantial right made on summary application in an action after a judgment is rendered.
5. **Workers' Compensation: Appeal and Error.** A party can appeal an order from the Workers' Compensation Court if it affects the party's substantial right.

6. **Final Orders.** Substantial rights under Neb. Rev. Stat. § 25-1902 (Reissue 2008) include those legal rights that a party is entitled to enforce or defend.
7. **Final Orders: Appeal and Error.** A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant before the order from which an appeal is taken.
8. ____: ____. When multiple issues are presented to a trial court for simultaneous disposition in the same proceeding and the court decides some of the issues, while reserving other issues for later determination, the court's determination of fewer than all the issues is an interlocutory order and is not a final order for the purpose of an appeal.
9. **Workers' Compensation: Final Orders: Legislature: Intent: Appeal and Error.** Permitting employers to appeal from an adverse ruling before the Workers' Compensation Court has determined benefits is inconsistent with the Legislature's intent to provide prompt benefits to injured workers.
10. **Workers' Compensation: Judgments: Final Orders.** From the date of this decision, a Workers' Compensation Court's finding of a compensable injury or its rejection of an affirmative defense without a determination of benefits is not an order that affects an employer's substantial right in a special proceeding.

Appeal from the Workers' Compensation Court: J. MICHAEL FITZGERALD, Judge. Appeal dismissed, and cause remanded for further proceedings.

Patrick R. Guinan, of Erickson & Sederstrom, P.C., for appellant.

Jacob M. Steinkemper, of Brock Law Offices, P.C., L.L.O., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MILLER-LERMAN, and CASSEL, JJ.

CONNOLLY, J.

SUMMARY

This workers' compensation appeal presents a jurisdictional issue: Did the appellant, Aurora Cooperative (Co-op), appeal from a final order? In a bifurcated proceeding, the trial court determined that the appellee, John Jacobitz, was injured in the scope of his employment. Although the court had reserved the issue of benefits for later determination, the Co-op appealed.

Our case law has been inconsistent on the finality of workers' compensation orders when an employer appeals from an

adverse ruling. We now clarify that such rulings are not final and appealable until the trial court determines benefits for the prevailing claimant. We dismiss the appeal.

BACKGROUND

Jacobitz sustained a traumatic brain injury when he fell off a flatbed truck driven by Jerry Overturf, the location manager for the Co-op's facility in Ong, Nebraska. The Co-op had just hosted a customer appreciation supper, and Jacobitz was helping to clean and put away a large grill. Overturf towed the grill to a shed on the Co-op's property, and Jacobitz and another manager helped Overturf put the grill inside. Jacobitz then hopped on the back of the flatbed truck for a ride back to the community center where the event was held. He fell off about half a block later.

The primary dispute at trial was whether Jacobitz was injured in the scope of his employment. The court granted Jacobitz' motion to bifurcate the trial. Jacobitz had argued that he had not yet reached maximum medical improvement but that the court could first decide whether he was injured in the scope of his employment. At the start of the trial, the court stated, and the parties agreed, that they were trying only the issue of liability. The parties disputed whether Overturf asked Jacobitz to come and help host the event or whether he was told only that he could come if he wished. They also disputed whether the Co-op or its vendors had sponsored the event.

In its "Award" order, the court found that Jacobitz believed that he had to attend, or that it would be in his best interests to attend the event. The court found that Jacobitz' testimony was the best explanation for why he would have driven to his home 30 miles away to clean up and come back to the event, despite having a family and not earning high wages. It rejected the Co-op's argument that it had not sponsored the event. The court also found that the Co-op had received a substantial benefit from the event and had also benefited from Jacobitz' assistance. It concluded that Jacobitz was injured in an accident arising out of and in the course of his employment.

The court issued its order on January 28, 2013. At the end of the order, the court scheduled a telephone conference for February 4 to set a trial date to determine benefits. The Co-op filed its notice of appeal on February 1.

ASSIGNMENTS OF ERROR

The Co-op assigns, restated and reduced, that the trial court erred as follows: (1) finding that Jacobitz was injured in the scope of his employment; (2) finding that the customer appreciation supper was a regular incident of employment; (3) assigning liability because Jacobitz subjectively believed he had to attend the supper and that his attendance would be to his benefit; (4) finding that the Co-op received a substantial benefit from the supper and Jacobitz' attendance and assistance, absent evidence of a "direct" benefit to the Co-op; (5) entering an "Award" based on facts that were irrelevant, clearly wrong, and insufficient; (6) receiving an exhibit into evidence over the Co-op's objection; and (7) failing to render a reasoned decision.

STANDARD OF REVIEW

[1,2] We independently review questions of law decided by a lower court.[1] A jurisdictional issue that does not involve a factual dispute presents a question of law.[2]

ANALYSIS

[3] For an appellate court to acquire jurisdiction of an appeal, the party must be appealing from a final order or a judgment.[3] Because workers' compensation proceedings are special proceedings,[4] the issue is whether the court's order is final.

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[1] *Guinn v. Murray*, 286 Neb. 584, 837 N.W.2d 805 (2013).

[2] *In re Interest of Edward B.*, 285 Neb. 556, 827 N.W.2d 805 (2013).

[3] See, Neb. Rev. Stat. § 25-1911 (Reissue 2008); *Becerra v. United Parcel Service*, 284 Neb. 414, 822 N.W.2d 327 (2012); *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011). See, also, Neb. Rev. Stat. § 25-1301(1) (Reissue 2008).

[4] *Becerra*, *supra* note 3.

The Nebraska Court of Appeals ordered the parties to brief whether the trial court's order was final even though it had not yet determined benefits. The Co-op argues that the order affected a substantial right in a special proceeding because the order eliminated its complete defense to Jacobitz' claim. Jacobitz cites cases holding that the order was not final because the court reserved issues for later determination.

[4] Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), an appellate court may review three types of final orders: (1) an order that affects a substantial right and that determines the action and prevents a judgment, (2) an order that affects a substantial right made during a special proceeding, and (3) an order that affects a substantial right made on summary application in an action after a judgment is rendered.[5]

[5-7] Only the second category is applicable here. A party can appeal an order from the Workers' Compensation Court if it affects the party's substantial right.[6] Substantial rights under § 25-1902 include those legal rights that a party is entitled to enforce or defend.[7] A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant before the order from which an appeal is taken.[8]

[8] But even in workers' compensation cases, we have held that when multiple issues are presented to a trial court for simultaneous disposition in the same proceeding and the court decides some of the issues, while reserving other issues for later determination, the court's determination of fewer than all the issues is an interlocutory order and is not a final order for the purpose of an appeal.[9]

The tension between these two rules—one delineating an affected substantial right and the other delineating

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[5] *Id.*

[6] See, e.g., *id.*

[7] *Big John's Billiards v. State*, 283 Neb. 496, 811 N.W.2d 205 (2012).

[8] *Id.*

[9] See, e.g., *Becerra*, *supra* note 3; *Merrill v. Griswold's, Inc.*, 270 Neb. 458, 703 N.W.2d 893 (2005).

interlocutory orders—has created two conflicting lines of cases dealing with final orders in workers' compensation appeals. In two cases, Nebraska appellate courts have permitted employers to appeal from the trial court's rejection of its "complete defense" to liability.[10] Although we did not define that term, in those cases, the complete defense was an affirmative defense, which, if it had been successful, would have permitted the employer to prevail even if the claimant proved that he or she sustained a work-related injury.[11] But in cases where the employer's defense is that the claimant failed to prove a work-related injury, we have held that an appeal is interlocutory when the trial court has reserved issues for later determination.[12]

This troubling body of cases has created confusion whether an employer can appeal from a trial court's finding of liability, even if the court has reserved its decision regarding benefits. The confusion exists because a failure of proof defense (e.g., a defense that the claimant has not shown the injury occurred in the scope of employment) is also a complete defense to liability. But more important, interlocutory appeals conflict with the beneficent purpose of the Nebraska Workers' Compensation Act (Act) to provide injured workers with prompt relief from the adverse economic effects caused by a work-related injury.[13]

"Under the Act, employees give up the complete compensation that they might recover under tort law in exchange for no-fault benefits that they quickly receive for most economic losses from work-related injuries."[14] And unnecessary delays in

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[10] See, *Larsen v. D B Feedyards*, 264 Neb. 483, 648 N.W.2d 306 (2002); *Morin v. Industrial Manpower*, 13 Neb. App. 1, 687 N.W.2d 704 (2004).

[11] See *id.*

[12] See, *Merrill*, *supra* note 9; *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003); *Hamm v. Champion Manuf. Homes*, 11 Neb. App. 183, 645 N.W.2d 571 (2002).

[13] See *Zwiener v. Becton Dickinson-East*, 285 Neb. 735, 829 N.W.2d 113 (2013).

[14] *Moyera v. Quality Pork Internat.*, 284 Neb. 963, 978, 825 N.W.2d 409, 420 (2013).

the payment of benefits are contrary to the purpose of providing prompt relief.[15]

Moreover, this concern is present whether the trial court has rejected an employer's failure of proof defense or its affirmative defense. In either case, permitting an employer to appeal will frequently cause a hardship for the prevailing claimant because Nebraska's workers' compensation statutes do not require the employer to pay benefits or waiting-time penalties pending an appeal based on a reasonable controversy.[16]

But if the issue of benefits has been decided before an employer appeals and the award is affirmed on appeal, then the employer must pay the benefits within 30 days after the appellate court's mandate is filed in the Workers' Compensation Court.[17] We have explained that "because contested claims cause a delay of compensation, it is imperative to discourage any further delay following an appeal."[18]

Permitting piecemeal appeals, however, defeats the waiting-time penalty rule that requires prompt payment of benefits after an appeal, when an employer has appealed in good faith but the claimant prevailed. Instead of receiving a speedy payment of benefits immediately after the mandate is issued, a prevailing claimant would face further litigation on the issue of benefits. At that point, the employer could appeal again if a reasonable controversy existed regarding the court's award of benefits.

Even if we limited interlocutory appeals to an employer's appeal from the court's rejection of an affirmative defense, the number of claimants who would be adversely affected by the delay in determining benefits is potentially large. Affirmative defenses would include all of the following: (1) defenses that a claimant is not covered by the Act; (2) defenses that

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[15] *Estate of Teague v. Crossroads Co-op Assn.*, 286 Neb. 1, 834 N.W.2d 236 (2013).

[16] See, *Lagemann v. Nebraska Methodist Hosp.*, 277 Neb. 335, 762 N.W.2d 51 (2009); Neb. Rev. Stat. § 48-125(1)(b) (Reissue 2010).

[17] See *Lagemann*, *supra* note 16.

[18] *Id.* at 341, 762 N.W.2d at 57, citing *Leitz v. Roberts Dairy*, 239 Neb. 907, 479 N.W.2d 464 (1992).

jurisdiction in a Nebraska court is improper; (3) defenses that the claim is barred by the statute of limitations; defenses that the claimant failed to properly notify the employer of the injury; (4) defenses that the claimant deliberately violated a safety rule; and (5) defenses that a claimant was willfully negligent or intoxicated.[19] A prevailing claimant in any of these types of cases would face a substantial economic hardship in delayed benefits if we permitted employers to appeal before a court awarded benefits.

But comparable concerns are not raised by precluding an employer's interlocutory appeal when the court has determined only that the claimant's injury is compensable or that the employer's affirmative defense is without merit, but has not determined benefits. In that circumstance, the employer sustains no economic detriment by waiting to appeal until the trial court enters an award that specifies the claimant's benefits.

[9,10] It remains true that an order in a special proceeding is final for the purpose of an appeal if it affects a party's substantial right. But we cannot be blind to the unequal effect of permitting interlocutory appeals in workers' compensation cases. And permitting employers to appeal from an adverse ruling before the Workers' Compensation Court has determined benefits is inconsistent with the Legislature's intent to provide prompt benefits. So instead of ironing out every wrinkle in our case law, we hold the following: From the date of this decision, a Workers' Compensation Court's finding of a compensable injury or its rejection of an affirmative defense without a determination of benefits is not an order that affects an employer's substantial right in a special proceeding.

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[19] See, e.g., Neb. Rev. Stat. §§ 48-101, 48-102(a), 48-106(2), 48-127, 48-133, and 48-137 (Reissue 2010); *Moyera*, *supra* note 14; *Risor v. Nebraska Boiler*, 277 Neb. 679, 765 N.W.2d 170 (2009); *Estate of Coe v. Willmes Trucking*, 268 Neb. 880, 689 N.W.2d 318 (2004); *Dawes*, *supra* note 12; *Larsen*, *supra* note 10; *Guico v. Excel Corp.*, 260 Neb. 712, 619 N.W.2d 470 (2000); *Nalley v. Consolidated Freightways, Inc.*, 204 Neb. 370, 282 N.W.2d 47 (1979); *Morin*, *supra* note 10.

CONCLUSION

We conclude that the Co-op has not appealed from a final order because the trial court has determined only that Jacobitz' accident occurred in the scope of his employment, but has not yet determined benefits. We therefore dismiss the appeal and remand the cause for further proceedings.

APPEAL DISMISSED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

McCORMACK, J., participating on briefs.

IN RE INTEREST OF LANDON H., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. BONNIE H., APPELLANT.

841 N.W.2d 369

Filed December 27, 2013. No. S-13-140.

1. **Constitutional Law: Due Process: Appeal and Error.** Whether the procedures given an individual comport with constitutional requirements for procedural due process presents a question of law, which an appellate court independently reviews.
2. **Constitutional Law: Parental Rights: Due Process.** Because of a natural parent's fundamental liberty interest in the care, custody, and management of their child, if the State intervenes to adjudicate a child or terminate the parent-child relationship, its procedures must meet the requisites of the Due Process Clause.
3. **Juvenile Courts: Parental Rights: Due Process.** A juvenile court order that terminates parental rights through procedures that violate the parent's due process rights is void.
4. **Constitutional Law: Due Process.** Procedural due process requires notice to the person whose right is affected by the proceeding; reasonable opportunity to refute or defend against the charge or accusation; reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by the Constitution or statutes; and a hearing before an impartial decisionmaker.
5. **Juvenile Courts: Parental Rights: Right to Counsel.** In juvenile proceedings, Neb. Rev. Stat. § 43-279.01(1)(b) (Reissue 2008) gives a parent the right to appointed counsel if the parent cannot afford an attorney.
6. **Juvenile Courts: Parental Rights: Due Process.** When a juvenile court knows that a parent is incarcerated or confined nearby, it should take steps, without request, to afford the parent due process before adjudicating a child or terminating the parent's parental rights.

7. **Juvenile Courts: Parental Rights: Attorney and Client: Notice.** A juvenile court may not assume that a parent has avoided communications with his or her attorney unless the attorney shows that he or she has made diligent efforts to serve notice to the parent of the attorney's intent to withdraw from the representation.
8. **Juvenile Courts: Parental Rights: Right to Counsel: Due Process.** Absent circumstances showing that a parent has avoided contact with his or her attorney, a juvenile court must respect the parent's due process right to representation by an attorney.

Appeal from the Separate Juvenile Court of Lancaster County: TONI G. THORSON, Judge. Vacated and remanded with direction.

David P. Thompson, of Thompson Law, P.C., L.L.O., for appellant.

Joe Kelly, Lancaster County Attorney, and Daniel Zieg for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

CONNOLLY, J.

SUMMARY

The juvenile court allowed the attorney for the appellant, Bonnie H., to withdraw at the start of a default hearing to terminate Bonnie's parental rights without requiring the attorney to show that he gave notice to Bonnie of his intent to withdraw. We conclude that the court's ruling denied Bonnie due process and constituted plain error. We vacate the court's order and remand the cause with direction.

BACKGROUND

In October 2011, Bonnie was ingesting narcotics in a parked vehicle with a male companion. Landon H., who was then age 2, was asleep in the back seat. Police officers arrested Bonnie and took Landon into emergency custody. Landon's father, Shawn H., was incarcerated at the time. Landon was later placed with foster parents. He has reactive attachment disorder and behavioral problems. Bonnie has a history of substance

abuse and had previously relinquished her parental rights for her two other children.

The court appointed counsel for Bonnie in November 2011. At the first adjudication hearing in December, Bonnie's counsel appeared without her to deny the allegations. The court continued the hearing. In January 2012, Bonnie appeared and pleaded no contest to the State's allegation that she had cocaine on her person when the police searched her. The court adjudicated Landon under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) because of parental neglect. The juvenile court's rehabilitation plan required Bonnie to cooperate with drug treatment and testing, obtain a legal means of income, maintain regular contact with the representative for the Department of Health and Human Resources (Department), and provide contact information.

In February 2012, counsel appeared with Bonnie for a disposition hearing. The court found that she was unemployed and homeless, had not cooperated with offered services, and had not consistently provided the Department with her contact information. The court found that she had made poor progress toward the goal of reunification. The alternative plan was adoption.

At the April 2012 child support and review hearing, counsel appeared without Bonnie. The court continued the hearing until June. At the June hearing, counsel appeared again without Bonnie. In addition to its previous requirements, the court ordered Bonnie to obtain psychiatric treatment. The court continued the child support hearing and scheduled another review hearing for September. The court also scheduled a permanency plan hearing for January 2013.

At the September 2012 child support and review hearing, counsel appeared without Bonnie. Bonnie was still making poor progress toward the goal of reunification. The court scheduled the next review hearing to coincide with the January permanency plan hearing. But before the court issued the order, the State had already moved to terminate Bonnie's parental rights. The court scheduled the termination hearing for October 24. It ordered the clerk to issue summons and notice to both parents.

On October 24, 2012, counsel appeared without Bonnie. The court continued the hearing to December 5 to allow for service on Shawn by publication. In November, the court issued an order that rescinded a previous order for service on Bonnie by publication. The court stated that Bonnie had been personally served, but the record does not show where or when she was served.

On December 5, 2012, counsel appeared without Bonnie. The court continued the termination hearing, for good cause shown. It set a default hearing to terminate parental rights for January 4, 2013, the day previously scheduled for the permanency plan hearing. The order commanded Bonnie and Shawn to appear and stated, "You or your attorney may present evidence on your behalf . . . ." The order warned the parents that it would be deciding whether to terminate their parental rights. A note at the bottom of the order specifically stated that the court sent a copy to Bonnie at the Lancaster County jail in Lincoln, Nebraska.

At the January 4, 2013, termination hearing, counsel again appeared without Bonnie. Before the hearing started, Bonnie's attorney asked the court for leave to withdraw. He said that he had had no recent contact with Bonnie and that his last contact was in February 2012. He also said that he had scheduled several meetings at his office but that she had failed to appear and had not responded to his telephone calls and letters. Because Bonnie had not communicated with him, the court allowed him to withdraw. But the court stated that it would consider Bonnie's request for counsel if she contacted the court.

The caseworker testified that Bonnie had not visited Landon since the previous summer and had moved to Grand Island, Nebraska, since then. The caseworker said that she last contacted Bonnie through an e-mail 4 to 5 months earlier but that Bonnie had not responded to her request for an address. She said that Bonnie had occasionally asked to see Landon, but without knowing her address, the caseworker could not provide visitation and drug testing services to Bonnie in Grand Island. She said that Bonnie had not provided any

support for Landon and that Landon's behavioral problems had worsened when in Bonnie's presence. The court agreed with the Department that the evidence supported termination of both Bonnie's and Shawn's parental rights. The court's order noted that a copy was sent to Bonnie at an address in Edgar, Nebraska.

Bonnie's attorney moved for payment of his fees for February, July, and November 2012. Contrary to his statement to the court that he last contacted Bonnie in February, his affidavits showed that he met Bonnie "in custody" on October 19 and again on October 24, the date of the first termination hearing. He also listed fees for several telephone calls to or from Bonnie after February, most recently on October 8.

A written order shows that the day after the court issued its termination order, it heard Bonnie's request for appointment of a different attorney to represent her. The court sustained Bonnie's request for an attorney and later issued an order allowing Bonnie to proceed in forma pauperis on appeal.

ASSIGNMENTS OF ERROR

Bonnie argues that the court's order, which allowed her attorney to withdraw before the termination hearing began, denied her due process. But in her brief, Bonnie has not assigned the court's action as error. Absent plain error, an appellate court considers only an appellant's claimed errors that the appellant specifically assigns in a separate "assignment of error" section of the brief and correspondingly argues in the argument section.[1]

STANDARD OF REVIEW

[1] Whether the procedures given an individual comport with constitutional requirements for procedural due process presents a question of law, which we independently review.[2]

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[1] See, Neb. Ct. R. App. P. § 2-109(D)(1)(e) (rev. 2012); *In re Interest of Samantha L. & Jamine L.*, 286 Neb. 778, 839 N.W.2d 265 (2013), citing *In re Interest of Jamyia M.*, 281 Neb. 964, 800 N.W.2d 259 (2011).

[2] See, e.g., *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012); *In re Interest of Davonest D. et al.*, 19 Neb. App. 543, 809 N.W.2d 819 (2012).

ANALYSIS

Bonnie contends that she had a statutorily guaranteed right to counsel. She argues that the juvenile court violated her due process rights when it allowed her counsel to withdraw from representing her without notifying her. She argues that she was entitled to expect that her attorney would represent her by making proper arguments and cross-examining the State's witness.

The State disagrees. It contends that a parent waives the right to be present at a termination hearing if he or she voluntarily or negligently fails to appear after proper notice. It further contends that the court did not deny her due process because she had an opportunity to contact her attorney or appear at the hearing to represent herself or to ask the court for a new attorney. But the record does not affirmatively show that Bonnie elected to be unrepresented or that the court took any steps to afford her due process in a termination proceeding.

[2,3] Because of a natural parent's fundamental liberty interest in the care, custody, and management of their child,[3] if the State intervenes to adjudicate a child or terminate the parent-child relationship, its procedures must meet the requisites of the Due Process Clause.[4] A juvenile court order that terminates parental rights through procedures that violate the parent's due process rights is void.[5]

[4,5] Procedural due process requires notice to the person whose right is affected by the proceeding; reasonable opportunity to refute or defend against the charge or accusation; reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by the Constitution or statutes; and a hearing

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[3] *Michael E. v. State*, 286 Neb. 532, 839 N.W.2d 542 (2013).

[4] *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004).

[5] See *id.*

before an impartial decisionmaker.[6] In juvenile proceedings, Neb. Rev. Stat. § 43-279.01(1)(b) (Reissue 2008) gives a parent the right to appointed counsel if the parent cannot afford an attorney.

The record shows that 5 days before the October 24, 2012, termination hearing, Bonnie's counsel met with her "in custody," and he met with her again on October 24. The court continued this hearing to provide time for the State to notify Shawn of the hearing by publication. But Bonnie's counsel did not claim at the October 24 hearing that he could not represent Bonnie because he had not communicated with her about the termination proceeding.

As noted, in the court's November 2012 order, it did not state how or where personal service was made. But the record shows that at the continued termination hearing on December 5, the court knew that Bonnie was in jail. In the court's order, which continued the termination hearing to January 2013 for good cause, the court stated that a copy of the order was mailed to Bonnie at the Lancaster County jail.

Although the court and counsel did not discuss Bonnie's confinement on the record, either the county attorney or Bonnie's attorney had obviously informed the court that Bonnie was in jail. Yet, the court did not ensure that she would be able to participate in the termination proceeding or verify that despite Bonnie's confinement, her attorney would be able to represent her. The court's failure to take these steps is inconsistent with the requirements that we have set out for these circumstances.

We have held that

> parental physical presence is unnecessary for a hearing to terminate parental rights, *provided* that the parent has been afforded procedural due process for the hearing to terminate parental rights.
>
> If a parent has been afforded procedural due process for a hearing to terminate parental rights, allowing a

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[6] *Id.*; *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992), citing *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972).

> parent who is incarcerated or otherwise confined in custody of a government to attend the termination hearing is within the discretion of the trial court . . . .[7]

In that case, the parent was incarcerated in another state. Although he did not personally appear, he received notice of the accusations against him, participated telephonically in the hearing, and was represented by counsel. So he was not denied due process.

In *In re Interest of Mainor T. & Estela T.*,[8] we considered a parent's due process rights who was jailed during the adjudication proceeding. There, the record showed that the court knew the parent was in the county jail next door to the courthouse. She was not represented by counsel and had not waived her right to counsel, and the court did not provide an opportunity for her to participate in the adjudication proceeding. The court's failure to ensure that she could participate personally or through an attorney violated her due process rights. We vacated the court's order.

[6] We clarified that juvenile courts are not required to conduct inquiries into the whereabouts of every parent who fails to appear for a scheduled hearing. In most cases, a parent who has notice of the hearing should request to personally participate.[9] But when a court knows that a parent is incarcerated or confined nearby, it should take steps, without request, to afford the parent due process before adjudicating a child or terminating the parent's parental rights.[10]

Here, instead of conducting the December 2012 termination hearing in a manner that afforded Bonnie due process, the court continued the hearing until January 2013. Despite knowing that Bonnie was in jail in the same city, the court made no inquiries whether she would be released for the January hearing, whether her attorney could represent her without her presence, or how to arrange for her participation even if she was

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[7] *In re Interest of L.V., supra* note 6, 240 Neb. at 416, 482 N.W.2d at 258.

[8] See *In re Interest of Mainor T. & Estela T., supra* note 4.

[9] See *id.*

[10] See *id.*

not present. At the continued termination hearing in January, the court similarly took no steps to ensure that Bonnie was afforded due process.

At the January 2013 hearing, Bonnie's attorney stated to the court that he had previously raised his lack of communications with Bonnie at the December 2012 hearing. As noted, he reported at the January 2013 hearing that he had not communicated with Bonnie since February 2012. But the court did not ask counsel why he could not communicate with her in jail or how he was able to represent her at the October 2012 termination hearing if he had not communicated with her. Moreover, the court's termination order stated that a copy was sent to Bonnie at an address in Edgar, Nebraska, and Bonnie asked for a new attorney 1 day after the court issued its order. But nothing in the record shows that her attorney had tried to reach her in jail or at her address in Edgar.

It is true that we held in *In re Interest of A.G.G.*[11] that after a court has acquired jurisdiction over a parent and appointed counsel, the parent has an obligation to keep the attorney and the court informed of his or her whereabouts. There, we concluded that termination of a mother's parental rights did not violate due process despite her absence from the hearing. But the circumstances of that case were different. Although the mother had avoided service, she had actual notice of the termination proceeding and nonetheless informed the caseworker that she would not attend. The State had made diligent efforts to serve her with notice. Most important, the mother was represented by counsel, who moved to dismiss the proceedings for lack of jurisdiction. In fact, the trial court appointed that attorney after it allowed the mother's previous attorney to withdraw because he could not communicate with her about the termination proceeding.

In contrast, here we cannot conclude that the parent has avoided service or refused to attend the hearing despite having actual notice. The court's order suggests that Bonnie was not in jail when the court issued its order on January 17, 2013. But we do not know whether she was still in jail during the

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[11] See *In re Interest of A.G.G.*, 230 Neb. 707, 433 N.W.2d 185 (1988).

January 4 hearing. We are equally concerned that because Bonnie's attorney had represented her without her attendance at many hearings, she would have believed that he would continue to do so.

Under Neb. Ct. R. of Prof. Cond. § 3-501.3, a lawyer must act with reasonable diligence and promptness in representing a client. Comment 4 explains that diligence includes continuing the representation unless the lawyer has complied with the rule for termination of representation, particularly when the client has reason to believe that the lawyer will continue to serve the client's interests:

> Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so.

Bonnie's mistaken reliance on her attorney creates our concern here. Because Bonnie's attorney had represented her at many hearings, including the first termination hearing, without her appearance, she could have reasonably believed that he would also represent her at the continued hearing. So we conclude that a juvenile court should not permit an attorney to withdraw from representing a parent at a termination hearing for lack of communication unless the attorney shows that he or she has provided notice of an intent to withdraw or made diligent efforts to do so.

Under Neb. Ct. R. of Prof. Cond. § 3-501.16(b), a lawyer may withdraw from representing a client only if the lawyer offers a specified reason for withdrawal and shows that he has complied with notice laws or obtained the court's permission

to terminate the representation. A lawyer must "take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client [and] allowing time for employment of other counsel."[12] A court should consider whether withdrawal could be accomplished without a material adverse effect on the client's interests.[13]

[7] Indigent parents in juvenile proceedings have a statutory right to an attorney because they have fundamental rights at stake. Because of those rights, we hold that a juvenile court may not assume that a parent has avoided communications with his or her attorney unless the attorney shows that he or she has made diligent efforts to serve notice to the parent of the attorney's intent to withdraw from the representation. As this case illustrates, without a requirement that the attorney show proof of service of an intent to withdraw, a court may not know all the relevant circumstances of the parent's whereabouts or whether the attorney has in fact made diligent efforts to contact the client.

[8] We cannot conclude that Bonnie irresponsibly avoided her attorney when her parental rights were at stake, rather than assuming that he would continue to represent her as he had at the October 2012 termination hearing. Absent circumstances showing that a parent has avoided contact with his or her attorney, a juvenile court must respect the parent's due process right to representation by an attorney.

CONCLUSION

After reviewing for plain error, we conclude that the court's procedures denied Bonnie due process at the termination hearing. We therefore vacate the court's order and remand the cause with direction to conduct a new termination hearing.

VACATED AND REMANDED WITH DIRECTION.

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[12] § 3-501.16(d).

[13] See § 3-501.16(b)(1).

LORNA RADER, APPELLANT, V. SPEER AUTO, APPELLEE.

841 N.W.2d 383

Filed December 27, 2013. No. S-13-229.

1. **Workers' Compensation: Appeal and Error.** A judgment, order, or award of the Workers' Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court, a higher appellate court reviews the trial judge's findings of fact, which will not be disturbed unless clearly wrong.
3. ____: ____. Regarding questions of law, an appellate court in workers' compensation cases is obligated to make its own decisions.
4. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact by the Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party, every controverted fact must be resolved in favor of the successful party, and the successful party will have the benefit of every inference that is reasonably deducible from the evidence.
5. **Workers' Compensation: Jurisdiction: Statutes.** As a statutorily created court, the Workers' Compensation Court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute.
6. **Workers' Compensation: Proof.** To obtain a modification of an award, an applicant must prove, by a preponderance of evidence, that the increase or decrease in incapacity was due solely to the injury resulting from the original accident.
7. ____: ____. To obtain a modification of a prior award, the applicant must prove there exists a material and substantial change for the better or worse in the condition—a change in circumstances that justifies a modification, distinct and different from the condition for which the adjudication had been previously made.
8. **Workers' Compensation.** Whether an applicant's incapacity has increased under the terms of Neb. Rev. Stat. § 48-141 (Reissue 2010) is a finding of fact.
9. **Workers' Compensation: Appeal and Error.** Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
10. **Workers' Compensation: Evidence: Appeal and Error.** If the record contains evidence to substantiate the factual conclusions reached by the trial judge of the compensation court, an appellate court is precluded from substituting its view of the facts for that of the compensation court.
11. **Workers' Compensation: Proof.** To establish a change in incapacity under Neb. Rev. Stat. § 48-141 (Reissue 2010), an applicant must show a change in impairment and a change in disability.

12. **Workers' Compensation: Words and Phrases.** In a workers' compensation context, impairment refers to a medical assessment, whereas disability relates to employability.
13. ____: ____. Under the workers' compensation law, "disability" refers to loss of earning capacity and not to functional or medical loss alone.
14. ____: ____. Disability for purposes of the workers' compensation statutes is defined in terms of employability and earning capacity rather than in terms of loss of bodily function. In defining total disability, losses in bodily function are not important in themselves but are only important insofar as they relate to earning capacity and the loss thereof.

Appeal from the Workers' Compensation Court: JOHN R. HOFFERT, Judge. Affirmed.

Roger D. Moore, of Rehm, Bennett & Moore, P.C., L.L.O., for appellant.

Jon S. Reid, of Lamson, Dugan & Murray, L.L.P., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

Lorna Rader sustained a compensable injury while she was employed by Speer Auto. The Nebraska Workers' Compensation Court filed an "Award" on March 30, 2007, and after Rader filed a petition to modify, the compensation court filed a "Further Award" on April 10, 2009. Rader filed another petition to modify on June 29, alleging that her "injury had materially and substantially worsened since April 10, 2009, necessitating a modification of the April 10, 2009 Further Award." Except for some medical expenses, Rader's petition to modify was denied.

In its order filed February 15, 2013, the Workers' Compensation Court found that Rader had not established a material and substantial change for the worse in her condition as required by Neb. Rev. Stat. § 48-141(2) (Reissue 2010) and that a modification was not warranted. It also found that Speer Auto had paid "in excess of the 300 weeks" and concluded in the alternative that under Neb. Rev. Stat. § 48-121(2)

(Reissue 2010), Speer Auto could not be ordered to pay more even if Rader had established entitlement to a modification. Rader appeals.

Because we determine that the compensation court did not err when it found that Rader did not prove by a preponderance of the evidence a material and substantial change for the worse in her condition warranting a modification of the award under § 48-141(2), we affirm the order of the compensation court.

STATEMENT OF FACTS

On December 14, 2005, Rader was employed by Speer Auto when she suffered an injury to her low back. Rader filed a petition with the Workers' Compensation Court, and on March 30, 2007, the compensation court filed an award finding that Rader's injury was compensable. The compensation court found that Rader was employed by Speer Auto on the date of her accident and that she suffered an accident arising out of and in the course and scope of her employment. The compensation court noted that the parties stipulated that on the date of her accident, Rader earned an average weekly wage of $632.33. The compensation court found that Rader was temporarily totally disabled for 2⅐ weeks and that under Neb. Rev. Stat. § 48-119 (Reissue 2010), due to "the lack of evidence at trial that [Rader's] disability continued for six weeks or longer, the first seven calendar days of disability are not compensable." Thus, the compensation court determined that Rader was entitled to $481.77 for the period of total disability. The compensation court also noted that Rader had yet to meet maximum medical improvement, so "the issues of the permanency of [Rader's] low back injury as well as her entitlement to vocational rehabilitation benefits are not yet ripe for resolution." The compensation court found that Rader was entitled to medical benefits, past and future.

On July 21, 2008, Rader filed a petition to modify the March 30, 2007, award. On April 10, 2009, the Workers' Compensation Court filed a "Further Award" finding, inter alia, that Rader had reached maximum medical improvement and that she had sustained a loss of earning power of 50 percent.

The compensation court considered at length Rader's entitlement to further medical benefits in the form of surgery. Relying on expert opinion, the compensation court determined that Rader's psychological condition was a contributing factor to her report of pain and that surgery was not warranted at that time. The compensation court determined that Rader was entitled to permanent partial disability benefits and vocational rehabilitation benefits.

On June 29, 2012, Rader filed a petition to modify the April 10, 2009, "Further Award," alleging that her "injury has materially and substantially worsened since April 10, 2009." After trial, the Workers' Compensation Court filed a "Further Award" on February 15, 2013, and, except for the award of some injury-related medical expenses, the court denied Rader's petition to modify. This is the order from which Rader appeals. Speer Auto did not cross-appeal from the portion of the order directing it to pay certain medical expenses.

In its February 15, 2013, order, the Workers' Compensation Court noted that Rader was claiming an increase in her loss of earning capacity, but less than permanent total disability, and that thus, Rader was seeking permanent partial compensation. The compensation court found that Speer Auto had paid more than 300 weeks of disability benefits to Rader, and the court then referred to § 48-121(2). Section 48-121 generally provides for compensation for partial disability.

Section 48-121 provides in part:

> The following schedule of compensation is hereby established for injuries resulting in disability:
>
> . . . .
>
> (2) For disability partial in character, except the particular cases mentioned in subdivision (3) of this section, the compensation shall be sixty-six and two-thirds percent of the difference between the wages received at the time of the injury and the earning power of the employee thereafter, but such compensation shall not be more than the maximum weekly income benefit specified in section 48-121.01. This compensation shall be paid during the period of such partial disability but not beyond three hundred weeks. Should total disability be followed by

> partial disability, the period of three hundred weeks mentioned in this subdivision shall be reduced by the number of weeks during which compensation was paid for such total disability.

Although the Workers' Compensation Court read § 48-121(2) as precluding modification where, as here, a worker seeking permanent partial benefits had received benefits beyond 300 weeks, it nevertheless considered the substance of her petition to modify and determined that "[Rader's] request for modification must fail in any event." The court analyzed the medical evidence presented along with Rader's testimony, and found that regardless of its interpretation of § 48-121(2), the evidence did not support a modification.

The record shows that Rader testified before the compensation court and stated that she had had surgery in August 2012 for an injury not related to the low-back injury at issue in this case. Rader also testified that her level of functioning had decreased since the last time she was before the compensation court. She testified that she could stand for shorter periods and that her ability to bend and stoop had decreased. Rader further testified that the last time she was before the compensation court, she could lift a 20-pound weight from the floor, but now, without squatting or moving to her knees, she could lift 15 pounds at most from the floor. Rader further testified that the August surgery had not affected her tolerance for lifting, standing, sitting, bending, or stooping.

The compensation court received many medical reports into the record. The record contains a supplemental report by Dr. Dean K. Wampler dated October 30, 2012. In the supplemental report, Dr. Wampler noted that he had evaluated Rader in November 2008 and had issued a supplemental report in December. The compensation court had relied in part on Dr. Wampler's opinion in the court's April 10, 2009, "Further Award." In Dr. Wampler's supplemental report dated October 30, 2012, he reviewed Rader's medical information and opined that Rader had not experienced a material or substantial change with respect to her low-back injury at issue in this case. Dr. Wampler stated that

> it is my opinion with a reasonable degree of medical certainty that . . . Rader has not experienced any substantial or material change in her lumbar spine injury. Instead, her worsening function and increasing symptoms are attributable to an entirely different medical condition in her cervical spine that was most likely induced by a motor vehicle accident in 2004.

Dr. Wampler also stated that the cervical spine injury not at issue in this case "explains [Rader's] diminished function during the FCE [functional capacity evaluation] of August 2011."

The record also contains supplemental reports by Alfred J. Marchisio, the court-appointed counselor. In his initial report dated November 18, 2008, Marchisio determined that Rader had sustained a 45- to 50-percent loss of earning capacity, and the compensation court relied on Marchisio's opinion in its April 10, 2009, "Further Award" when the court determined that Rader had sustained a 50-percent loss of earning capacity. In Marchisio's supplemental report dated November 5, 2012, he stated that based upon the restrictions outlined in the August 2, 2011, functional capacity evaluation, he determined Rader's loss of earning capacity would be in "the 55-60 percent range." Marchisio based his opinion on Rader's posture and the amount of weight she could lift or carry. Marchisio also noted that Rader complained of pain in her low back, that her right leg would periodically "'give out,'" and that she had difficulty sleeping.

The record also contains a report from Karen L. Stricklett, a vocational rehabilitation consultant, which report is dated November 6, 2012. Stricklett stated in the report that she reviewed medical reports and records concerning Rader along with vocational records from Marchisio. In her review of the information, Stricklett noted that Rader's restrictions that were recommended by one of her treating physicians on September 13, 2008, and the restrictions noted in the August 2, 2011, functional capacity evaluation were "very similar." Stricklett further stated that "[t]he most recent medical records indicate that . . . Rader's ongoing symptoms are related to her cervical spine and are not related to the low back injury that she

sustained on 12/14/05." Stricklett concluded her report by stating that Rader had not experienced a material and substantial change in her loss of earning capacity and that nothing in Rader's condition had changed since the compensation court's April 10, 2009, "Further Award." Stricklett stated in the report:

> In conclusion, based upon the information that I have reviewed in connection with this case, I do not feel that . . . Rader has experienced a material and substantial increase in her loss of earning capacity since the 4/10/09 Further Award was entered by Judge Hoffert. This opinion is due to the fact that her restrictions are essentially the same as they were when . . . Marchisio issued his prior loss of earning capacity opinion and nothing else has changed since the 4/10/09 Award other than the fact that . . . Rade[r] has undergone additional medical treatment for a cervical problem that is unrelated to her 12/14/05 low back injury.

In rendering its decision on the merits, the court referred to "the opinion of the court appointed counselor as set forth in his report of November 5, 2012." In its order, the court stated:

> In that self-titled Supplemental Report, [the court-appointed counselor] opines that [Rader's] loss of earning power has increased from the 50 percent originally found by the Court in its earlier Award to 55-60 percent. . . . This scenario was based upon the restrictions set forth in the Functional Capacity Evaluation . . . .

Given this evidence, the compensation court found that Rader experienced a "loss of earning power of an additional 5 to 10 percent." However, given the record as a whole, this loss of earning power alone "does not serve to establish a material and substantial change for the worse in her condition as required by . . . § 48-141(2)."

Section 48-141 generally governs the Workers' Compensation Court's authority to modify an award. Section 48-141 provides:

> All amounts paid by an employer or by an insurance company carrying such risk, as the case may be, and received by the employee or his or her dependents by

> lump-sum payments pursuant to section 48-139 shall be final and not subject to readjustment if the lump-sum settlement is in conformity with the Nebraska Workers' Compensation Act, unless the settlement is procured by fraud, but *the amount of any agreement or award payable periodically may be modified as follows*: (1) At any time by agreement of the parties with the approval of the Nebraska Workers' Compensation Court; or (2) *if the parties cannot agree, then at any time after six months from the date of the agreement or award, an application may be made by either party on the ground of increase or decrease of incapacity due solely to the injury* or that the condition of a dependent has changed as to age or marriage or by reason of the death of the dependent. In such case, the same procedure shall be followed as in sections 48-173 to 48-185 in case of disputed claim for compensation.

(Emphasis supplied.)

Rader appeals.

ASSIGNMENTS OF ERROR

Rader generally claims, restated, that the Workers' Compensation Court erred when, except for certain medical expenses, it denied her petition to modify. Although she also challenges the Workers' Compensation Court's interpretation of the 300-week provision in § 48-121(2), we do not consider this argument because it is not necessary to our resolution of this appeal.

STANDARDS OF REVIEW

[1-3] A judgment, order, or award of the Workers' Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Hynes v. Good Samaritan Hosp.*, 285 Neb. 985, 830 N.W.2d 499 (2013).

In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court, a higher appellate court reviews the trial judge's findings of fact, which will not be disturbed unless clearly wrong. See, *id.*; *Cervantes v. Omaha Steel Castings Co.*, 20 Neb. App. 695, 831 N.W.2d 709 (2013). Regarding questions of law, an appellate court in workers' compensation cases is obligated to make its own decisions. *VanKirk v. Central Community College*, 285 Neb. 231, 826 N.W.2d 277 (2013).

ANALYSIS

In the February 15, 2013, order, the Workers' Compensation Court found, based on the evidence, that Rader had not met her burden of proving that a material and substantial change for the worse in her condition warranted a modification of the April 10, 2009, "Further Award." Accordingly, except for certain medical expenses not at issue in this appeal, the compensation court denied Rader's petition to modify the April 10 "Further Award." Rader claims on appeal that the compensation court erred when it denied her petition to modify.

[4] In testing the sufficiency of the evidence to support the findings of fact by the Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party, every controverted fact must be resolved in favor of the successful party, and the successful party will have the benefit of every inference that is reasonably deducible from the evidence. *Pearson v. Archer-Daniels-Midland Milling Co.*, 285 Neb. 568, 828 N.W.2d 154 (2013). In this case, Speer Auto, the employer, was the successful party and we view the evidence in its favor and give it the benefit of all favorable inferences. So viewing the evidence, we affirm.

[5] Although both parties question the jurisdiction of the Workers' Compensation Court, we conclude that the Workers' Compensation Court had subject matter jurisdiction over Rader's petition to modify the April 10, 2009, "Further Award" under § 48-141. As a statutorily created court, the Workers' Compensation Court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute. *Stueve v. Valmont Indus.*, 277 Neb. 292, 761 N.W.2d

544 (2009). More specifically, § 48-141, quoted earlier in this opinion, governs the compensation court's power to modify an award. Section 48-141 provides:

> [T]he amount of any agreement or award payable periodically may be modified as follows: . . . (2) if the parties cannot agree, then at any time after six months from the date of the agreement or award, an application may be made by either party on the ground of increase or decrease of incapacity due solely to the injury.

See, also, Neb. Rev. Stat. § 48-162.01(7) (Reissue 2010).

Rader filed her petition to modify the April 10, 2009, "Further Award" on June 29, 2012, which was more than 6 months after the April 10, 2009, award was filed. Accordingly, the Workers' Compensation Court had jurisdiction under § 48-141 to determine whether such modification was warranted.

[6,7] Nebraska case law provides that in order to obtain a modification of an award, an applicant must prove, by a preponderance of evidence, that the increase or decrease in incapacity was due solely to the injury resulting from the original accident. *Hagelstein v. Swift-Eckrich*, 261 Neb. 305, 622 N.W.2d 663 (2001); *McKay v. Hershey Food Corp.*, 16 Neb. App. 79, 740 N.W.2d 378 (2007). The applicant must prove there exists a material and substantial change for the better or worse in the condition—a change in circumstances that justifies a modification, distinct and different from the condition for which the adjudication had been previously made. *Lowe v. Drivers Mgmt., Inc.*, 274 Neb. 732, 743 N.W.2d 82 (2007); *Hagelstein v. Swift-Eckrich, supra*.

[8-10] We have stated that whether an applicant's incapacity has increased under the terms of § 48-141 is a finding of fact, see *Starks v. Cornhusker Packing Co.*, 254 Neb. 30, 573 N.W.2d 757 (1998), and upon appellate review, the findings of fact made by the trial judge have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong, see, *Hynes v. Good Samaritan Hosp.*, 285 Neb. 985, 830 N.W.2d 499 (2013); *Hagelstein v. Swift-Eckrich, supra*. If the record contains evidence to substantiate the factual conclusions reached by the trial judge of the compensation court, an

appellate court is precluded from substituting its view of the facts for that of the compensation court. *Hagelstein v. Swift-Eckrich, supra*.

[11,12] The appellate courts of this State have discussed "incapacity" as that term is used in § 48-141. In *Jurgens v. Irwin Indus. Tool Co.*, 20 Neb. App. 488, 495, 825 N.W.2d 820, 827 (2013), the Nebraska Court of Appeals summarized the two requisite showings needed to establish a change in incapacity under § 48-141 and stated: "To establish a change in incapacity, an applicant must show a change in impairment and a change in disability. . . . Impairment refers to a medical assessment whereas disability relates to employability."

[13,14] In *Bronzynski v. Model Electric*, 14 Neb. App. 355, 707 N.W.2d 46 (2005), the Nebraska Court of Appeals explained that an applicant who seeks to fulfill the requirements set forth in § 48-141 by demonstrating a change in incapacity must establish both a change in the employee's physical condition, or impairment, and a change in the employee's disability. The term "impairment" is a medical assessment, whereas the term "disability" is a legal issue. *Id*. Under the workers' compensation law, "disability" refers to loss of earning capacity and not to functional or medical loss alone. *Id*.

We have previously stated:

> [D]isability for purposes of [the workers' compensation] statute[s] is defined in terms of employability and earning capacity rather than in terms of loss of bodily function. In defining total disability, losses in bodily function are not important in themselves but are only important insofar as they relate to earning capacity and the loss thereof.

Wolfe v. American Community Stores, 205 Neb. 763, 765-66, 290 N.W.2d 195, 197-98 (1980).

We have further clarified the terminology by explaining that "'"'[p]ermanent medical impairment is related directly to the health status of the individual, whereas disability can be determined only within the context of the personal, social, or occupational demands, or statutory and regulatory requirements that the individual is unable to meet as a result of

the impairment.'"'" *Green v. Drivers Mgmt., Inc.*, 263 Neb. 197, 204-05, 639 N.W.2d 94, 102 (2002) (quoting *Phillips v. Industrial Machine*, 257 Neb. 256, 597 N.W.2d 377 (1999) (Gerrard, J., concurring; Hendry, C.J., and Miller-Lerman, J., join)). Given the foregoing definitions, showing a change in "incapacity," as provided in § 48-141, requires a showing of change in impairment and a change in disability.

With this framework in mind, the record shows that with respect to disability, the compensation court credited the opinion of the court-appointed counselor, Marchisio, as set forth in his "Supplemental Report" dated November 5, 2012. The compensation court in effect found that Rader established a change in disability. In his report, Marchisio stated that Rader's loss of earning power had increased from the 50 percent found by the compensation court in its April 10, 2009, order to 55 to 60 percent. Marchisio's opinion was based in part on a functional capacity evaluation. Although there were competing loss of earning power opinions, the trial judge was entitled to accept the opinion of one expert over another. See *Lowe v. Drivers Mgmt., Inc.*, 274 Neb. 732, 743 N.W.2d 82 (2007).

Elsewhere in the record, with respect to impairment, the evidence shows that an expert determined that Rader did not experience a material or substantial change in her condition. A fact finder could therefore determine on this record that Rader failed to prove a change in impairment. The supplemental report by Dr. Wampler states that he reviewed Rader's medical information and determined that Rader had "not experienced any substantial or material change" in her low-back injury that is at issue in this case. Instead, Dr. Wampler found that Rader's worsening function and increasing symptoms were "attributable to an entirely different medical condition."

"[T]o obtain a modification of a prior award, '[t]he applicant must prove there exists a material and substantial change for the better or worse in the condition.'" *Id.* at 738, 743 N.W.2d at 89 (quoting *Hagelstein v. Swift-Eckrich*, 261 Neb. 305, 622 N.W.2d 663 (2001)). Although the Workers' Compensation Court found a modest increase in the loss of earning power, which would support a worsening of disability, given the

record as a whole, Rader failed to establish a worsening of impairment as the Workers' Compensation Court implicitly found. See *Bennett v. J. C. Robinson Seed Co.*, 7 Neb. App. 525, 529, 583 N.W.2d 370, 373 (1998) (stating that "where a claimant is unable to demonstrate that his physical condition has changed since the prior award, a compensation court does not commit error in refusing to modify the previous award"), *disapproved on other grounds, Sheldon-Zimbelman v. Bryan Memorial Hosp.*, 258 Neb. 568, 604 N.W.2d 396 (2000).

The Workers' Compensation Court did not find an increase in incapacity under § 48-141. Whether an applicant's incapacity has increased under the terms of § 48-141 is a finding of fact. See *Starks v. Cornhusker Packing Co.*, 254 Neb. 30, 573 N.W.2d 757 (1998). Because the order of the Workers' Compensation Court is supported by the record and the findings are not clearly wrong, we find no error.

Because we determine that the compensation court did not err when it found that Rader failed to establish that her incapacity had increased under the terms of § 48-141 and was not entitled to a modification, we do not comment on the compensation court's interpretation of § 48-121(2). See *White v. Kohout*, 286 Neb. 700, 712, 839 N.W.2d 252, 262 (2013) (stating that "[a]n appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it").

CONCLUSION

Given the record and the Workers' Compensation Court's findings, we determine that the Workers' Compensation Court did not err in its February 15, 2013, order, in which it found that Rader failed to establish a material and substantial change for the worse in her condition warranting a modification of the April 10, 2009, "Further Award." The remainder of the order of February 15, 2013, was not challenged on appeal. Therefore, we affirm.

AFFIRMED.

State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Christopher A. Pfanstiel, respondent.

841 N.W.2d 212

Filed December 27, 2013. No. S-13-833.

Original action. Judgment of public reprimand.

Heavican, C.J., Wright, Connolly, Stephan, McCormack, Miller-Lerman, and Cassel, JJ.

Per Curiam.

INTRODUCTION

Respondent, Christopher A. Pfanstiel, was admitted to the practice of law in the State of Nebraska on January 17, 2000. At all relevant times, he was engaged in the private practice of law in Omaha, Nebraska. On September 25, 2013, the Counsel for Discipline of the Nebraska Supreme Court filed formal charges consisting of one count against respondent. In the one count, it was alleged that by his conduct, respondent had violated his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 2012), Neb. Ct. R. § 3-318 of the disciplinary rules, and Neb. Ct. R. of Prof. Cond. §§ 3-503.3(a) (candor toward tribunal) and 3-508.4(a) and (d) (misconduct).

On November 8, 2013, respondent filed a conditional admission pursuant to Neb. Ct. R. § 3-313 of the disciplinary rules, in which he conditionally admitted that he violated his oath of office as an attorney and §§ 3-318, 3-503.3(a), and 3-508.4(a) and (d). Respondent knowingly chose not to challenge or contest the truth of the matters conditionally admitted and waived all proceedings against him in connection therewith in exchange for a public reprimand.

The proposed conditional admission included a declaration by the Counsel for Discipline, stating that respondent's request for public reprimand is appropriate.

Upon due consideration, we approve the conditional admission and order that respondent be publicly reprimanded.

FACTS

The formal charges state that on January 20, 2012, respondent was personally sued in the county court for Douglas County to collect on a plumbing bill incurred by respondent in the amount of $1,158.96. See Credit Bureau Services, Inc. v. Christopher A. Pfanstiel, case No. CI 12-1712. Respondent was personally served with summons on January 25.

On January 30, 2012, respondent filed a motion to dismiss, alleging that the county court for Douglas County lacked jurisdiction because the plumbing services were contracted for and provided with respect to property owned by respondent in Saunders County. Respondent scheduled his motion to be heard on February 9 and sent notice to the attorneys representing Credit Bureau Services, Inc.

On February 3, 2012, an attorney representing Credit Bureau Services (the first attorney) filed a motion to continue the hearing of respondent's motion to February 23, and a copy of the motion to continue was mailed to respondent. On February 7, the county court issued an order continuing the hearing on respondent's motion to dismiss to February 23.

On February 23, 2012, respondent's motion to dismiss came on for hearing before the county court. Respondent failed to attend the hearing, and the court overruled the motion.

On March 14, 2012, a second attorney representing Credit Bureau Services (the second attorney) filed a motion for default judgment against respondent. On that day, the court entered default judgment against respondent in the amount of $1,158.96. Notice of the default judgment was mailed by the county court to respondent's residence in Omaha.

On March 16, 2012, respondent filed a motion to vacate the default judgment claiming that he had not received a copy of the first attorney's motion to continue or the county court's order rescheduling his motion to dismiss to February 23, and thus he did not appear for the hearing on February 23. Respondent requested that the default judgment be vacated and that his motion to dismiss be scheduled for a hearing. Respondent scheduled the hearing on his motion to vacate for April 12 and mailed a copy of the motion and notice to the second attorney.

On April 12, 2012, respondent's motion to vacate the default judgment came on for hearing. Respondent did not attend the hearing, and the county court denied respondent's motion.

On April 16, 2012, respondent filed an amended motion to vacate the default judgment, and a hearing on the motion was set for May 10. On May 10, the county court vacated the default judgment previously entered against respondent, and respondent was granted 10 days to file an answer to the complaint. On May 15, respondent filed his answer and counterclaim.

Also on May 15, 2012, respondent again filed his motion to dismiss, alleging that the county court lacked jurisdiction. A hearing was set on the motion to dismiss for June 28. At the hearing on June 28, the court denied respondent's motion to dismiss.

On June 28, 2012, the first attorney filed a motion for sanctions against respondent based on respondent's failing to attend the hearings on the two motions that respondent had filed in the pending case. The hearing on the motion for sanctions was held on September 27, at which time respondent was sanctioned and ordered to pay $700 to Credit Bureau Services.

On or about January 5, 2013, respondent moved his office from its location on 130th Street in Omaha to a location on Pacific Street in Omaha. Respondent did not file a change of address with the county court for Douglas County, nor did he send a change of address notice to the attorneys representing Credit Bureau Services.

On January 23, 2013, respondent filed a motion to reconsider the sanction entered against him on September 27, 2012. Respondent set the hearing on his motion to reconsider for January 28, 2013. The formal charges state that in his motion to reconsider, respondent incorrectly stated that his office address was at the location on 130th Street in Omaha.

The formal charges state that on January 28, 2013, respondent filed his affidavit with the county court in which he alleged that the first attorney "'has continually failed and/or refused to send proper and timely notices of hearings set by

[Credit Bureau Services] to [respondent].'" Respondent further alleged that the first attorney "'abuses the court system and good faith certifications, claiming that she has sent proper and timely notice to [respondent], when she has not sent proper and timely notices to [respondent].'" On March 1, the court issued an order denying respondent's motion to reconsider the sanction order.

The county court issued an order and notice of pretrial hearing, setting the pretrial hearing for April 4, 2013. According to the formal charges, the order stated, "'Failure to appear will cause a default judgment to be entered against you, or any other final disposition that is just and proper. YOU MUST ATTEND THIS HEARING.'" On March 18, the first attorney mailed a copy of the order and notice of pretrial hearing to respondent at the 130th Street location. Respondent failed to attend the pretrial hearing on April 4, and the default judgment was entered against him.

On April 19, 2013, respondent filed a motion to reconsider the default judgment. Respondent set the motion for hearing on May 9. The formal charges state the in the motion, respondent incorrectly stated that his office address was at the 130th Street location.

At the hearing on May 9, 2013, respondent offered his affidavit in support of his motion to reconsider the default judgment entered against him in April. According to the formal charges, respondent stated in his affidavit:

> "'[Respondent] believes that [the first attorney's] pattern and intentions are quite clear that while she certifies to the Court that she mails notice of all hearings to [respondent] via United States Mail, postage prepaid, she does not in fact mail said notice to [respondent], allowing her unfair advantage, and further costing both parties more time and expense; and further costing this Court more time and attention to unnecessary hearings/issues.'"

The formal charges state that respondent had no evidence to support his allegation that the first attorney falsified the certificates of service and that she did not in fact mail the notices to respondent.

During the hearing on May 9, 2013, respondent disclosed that he had filed a disciplinary grievance against the first attorney.

The formal charges allege that respondent's actions constitute violations of his oath of office as an attorney as provided by Nebraska statute § 7-104, disciplinary rule § 3-318, and professional conduct rules §§ 3-503.3(a) and 3-508.4(a) and (d).

ANALYSIS

Section 3-313, which is a component of our rules governing procedures regarding attorney discipline, provides in pertinent part:

> (B) At any time after the Clerk has entered a Formal Charge against a Respondent on the docket of the Court, the Respondent may file with the Clerk a conditional admission of the Formal Charge in exchange for a stated form of consent judgment of discipline as to all or part of the Formal Charge pending against him or her as determined to be appropriate by the Counsel for Discipline or any member appointed to prosecute on behalf of the Counsel for Discipline; such conditional admission is subject to approval by the Court. The conditional admission shall include a written statement that the Respondent knowingly admits or knowingly does not challenge or contest the truth of the matter or matters conditionally admitted and waives all proceedings against him or her in connection therewith. If a tendered conditional admission is not finally approved as above provided, it may not be used as evidence against the Respondent in any way.

Pursuant to § 3-313, and given the conditional admission, we find that respondent knowingly does not challenge or contest the matters conditionally admitted. The charges against respondent essentially allege that respondent failed to advise the first attorney of his change of address, but nevertheless, complained to the court and the Counsel for Discipline that the first attorney was falsifying her certificates of service. We determine that by his admitted conduct,

respondent violated disciplinary rule § 3-318, conduct rules §§ 3-503.3(a) and 3-508.4(a) and (d), and his oath of office as an attorney licensed to practice law in the State of Nebraska. Respondent has waived all additional proceedings against him in connection herewith. Upon due consideration, the court approves the conditional admission and enters the orders as indicated below.

CONCLUSION

Respondent is publicly reprimanded. Respondent is directed to pay costs and expenses in accordance with Neb. Ct. R. §§ 3-310(P) and 3-323(B) within 60 days after the order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF PUBLIC REPRIMAND.

STATE OF NEBRASKA, APPELLEE, V. RYAN M. ELSEMAN, APPELLANT.

841 N.W.2d 225

Filed January 3, 2014. No. S-12-1077.

1. **Trial: Evidence: Appeal and Error.** Because authentication rulings are necessarily fact specific, a trial court has discretion to determine whether evidence has been properly authenticated. An appellate court reviews a trial court's ruling on authentication for abuse of discretion.
2. **Criminal Law: Directed Verdict.** In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law, and a verdict may not be directed.
3. **Criminal Law: Convictions: Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

4. **Rules of Evidence: Proof.** Neb. Evid. R. 901, Neb. Rev. Stat. § 27-901(1) (Reissue 2008), does not impose a high hurdle for authentication or identification. A proponent of evidence is not required to conclusively prove the genuineness of the evidence or to rule out all possibilities inconsistent with authenticity. If the proponent's showing is sufficient to support a finding that the evidence is what it purports to be, the proponent has satisfied the requirement of rule 901(1).

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Affirmed.

Donald L. Schense, of Law Office of Donald L. Schense, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MILLER-LERMAN, and CASSEL, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

Ryan M. Elseman appeals his convictions in the district court for Douglas County of first degree murder and use of a deadly weapon to commit a felony. Elseman claims that the court erroneously admitted evidence regarding the content of certain text messages. He also claims that the court committed plain error when it overruled his motions for a directed verdict and that there was not sufficient evidence to support his convictions. We affirm Elseman's convictions and sentences.

STATEMENT OF FACTS

The charges against Elseman arose from an incident in which he shot and killed Kristopher Winters. The State alleged that Elseman shot Winters during an attempted robbery.

Elseman was among a group of people who were at the home of Nicholas Ely on July 6, 2011. Elseman's girlfriend's sister, Emily G., was also part of the group. Elseman left the house with Emily, Ely, and Marqus Patton with a plan to go swimming at Patton's apartment complex. The four were picked up by Drake Northrop. Emily had previously bought marijuana from Winters, and she suggested that the group go

to Winters' house to get some marijuana. At some point, it was decided that the group would rob Winters.

Emily directed Northrop to Winters' house, and they arrived there around noon. There was no response when Emily knocked on Winters' door, but a friend of Winters arrived at the door. Emily went into the house with the friend after she told him she was there to buy marijuana. Once inside, Emily sent Elseman a text message saying, "I'm in." She sent another message saying that Winters had a friend with him and that the doors were open.

Northrop, Elseman, Ely, and Patton entered the house through an open door. Elseman and Patton had guns. The men walked into a room occupied by Winters and his friend. Elseman pointed his gun and said, "'You know what it is.'" When Winters charged Elseman, Patton used his gun to hit Winters in the head. Winters stumbled but then pushed Patton up against a wall. Patton told Elseman to shoot Winters, and Elseman did. After the shots were fired, Northrop, Elseman, Ely, and Patton ran out of the house and drove away, leaving Emily behind. Northrop dropped the other three off at Patton's apartment.

Winters died as a result of the gunshot wounds, and Elseman was charged with first degree murder and use of a deadly weapon to commit a felony. The first degree murder count was charged alternatively as premeditated murder and as felony murder. The State's witnesses at Elseman's trial included Emily and Northrop. Neither Patton nor Ely testified at Elseman's trial.

Emily testified that while the group was driving to Winters' house, she was talking to her sister on a cell phone and overheard others in the car talking about a robbery. She testified that she had been told to send a text message to let Elseman know when she got into the house and to let him know whether the doors were open and how many people were in the house. Emily could not recall whether it was Elseman or someone else who had told her to send the text messages.

Emily testified that although she heard what sounded like gunshots when she was in the basement of Winters' house, she was not in a position to see the shooting. After hearing the

gunshots, she saw that Winters was holding his neck and she saw blood. She testified that she left the house and that as she was walking away, she received a text message from Elseman telling her to "get out of there because there was like a lot of cops around." She testified that Elseman also texted to her a telephone number she was to call to have "somebody that wouldn't snitch pick [her] up." Before Emily could meet up with that person, the police stopped her and spoke with her and eventually took her to the police station.

During Emily's testimony, the State asked questions about the cell phone she used to send text messages to Elseman. Emily testified that she had Elseman's number programmed into the cell phone, but that she did not recall his number. After establishing that Emily could refresh her memory of Elseman's number by looking at her cell phone, the State gave her the phone to check her contact list for Elseman's number. When the State asked Emily what Elseman's number was, Elseman objected based on foundation and argued that there was no evidence regarding the chain of custody of the cell phone. The court initially sustained the objection but overruled it after the State argued that the cell phone was being used only for the purpose of refreshing Emily's memory of Elseman's telephone number. Emily then recited Elseman's number based on her memory that had been refreshed by viewing the contact list on the cell phone.

Northrop testified that on July 6, 2011, Ely asked Northrop to give him a ride to Patton's apartment to go swimming. Northrop went to Ely's house to pick him up; Northrop also gave a ride to Patton, Elseman, and Emily. Patton sat in the front passenger seat, and Ely and Elseman sat in the back, with Emily in the middle. Northrop testified that during the drive, he agreed to go along with a plan to "go to a house and hit a lick." Northrop testified that "hit a lick" meant a robbery. He also testified that the plan was made by Ely, Emily, and Elseman. He specifically testified that Elseman said that "it would be easy, and the guy wouldn't fight back."

Emily directed Northrop to the house. Northrop heard Emily and Elseman make a plan that Emily would get into the house and would leave the doors unlocked or open and then send a

text message to Elseman to let them know how many people were inside. The four men waited outside while Emily went to the house. Northrop testified that while they were waiting, he saw Elseman look at his cell phone and then Elseman told the others that Emily had the doors open and that there were two people inside.

Northrop, Elseman, Ely, and Patton entered the house through a garage door. After they entered the house, Northrop saw that Elseman and Patton had guns. The four walked down a hallway, and when they reached a room at the end of the hallway, Elseman walked into the room first. Northrop saw Elseman point a gun and heard him say, "'You know what it is.'" Northrop then saw Winters "attack" Elseman by "kind of like grabbing him to wrestle with him." Northrop testified that Patton "pistol-whipped" Winters, which Northrop testified entailed Patton's hitting Winters in the head with the butt of Patton's gun. Northrop saw Winters stumble back and grab a chair, and then he saw Winters use the chair to ram Patton against the wall. Northrop testified that at that point, Patton told Elseman to shoot Winters. Elseman then shot Winters. Northrop saw Winters fall onto some steps, and then Northrop, Elseman, Ely, and Patton ran out of the house and back to Northrop's vehicle.

Northrop drove the men away from Winters' house and to Patton's apartment. While driving, Northrop observed Elseman making calls and sending text messages in an attempt to find someone to pick up Emily. Northrop dropped Elseman, Ely, and Patton at Patton's apartment and then went to his girlfriend's house.

Nicholas Palma testified that on July 6, 2011, he made plans to go swimming with his friends Ely and Patton. Before he left to go swimming at Patton's apartment complex, he received a call from Ely and the plan was changed such that Palma was to pick up Emily, whom Palma had met the night before at Ely's home. Palma did not find Emily at the location he had been told he would find her, and so he went to Patton's apartment. When he got there, he saw Elseman, Ely, and Patton. Palma testified that while they were talking about events that had occurred earlier in the day, Elseman "[s]aid that he had shot

somebody in the neck" and "that he wouldn't let his homeys take the charge for this. He would do life."

The State also presented testimony by law enforcement officers who investigated Winters' killing. Some of the testimony focused on text messages sent between individuals involved with the attempted robbery and shooting. Nicholas Herfordt, an Omaha police officer, testified regarding his training with respect to extracting data from cell phones. As part of the investigation of Winters' killing and the attempted robbery, Herfordt recovered data from the cell phones of the parties, including Emily, who were involved in the incident. Herfordt testified regarding the procedures he used to extract data. Herfordt stated on cross-examination that the information he could retrieve from a cell phone would not indicate who had made or received a particular call.

Donald Ficenec, a sergeant with the Omaha Police Department, testified that as part of the investigation of Winters' death, Ficenec compiled telephone records that had been obtained for various persons involved in the case. Such records showed the date and time of voice calls made between cell phones, but did not show the content of such calls. With regard to text messages, the records showed the content as well as the date and time.

Ficenec testified regarding the date, time, and duration of certain telephone calls and the date, time, and content of text messages that were relevant to this case. Ficenec testified regarding text messages sent between Emily's and Elseman's cell phones around the time that Winters was shot. Elseman made foundation objections to certain questions regarding the content of text messages sent from Elseman's cell phone to Emily's cell phone. The court overruled the objections. On cross-examination, Ficenec stated that although the telephone records could tell the content of text messages and the date and time the messages were sent, the records did not name the specific person who sent and received the messages, only the telephone numbers from which and to which the messages were sent.

Dave Schneider, a police detective on the team that investigated Winters' death, testified that he had obtained a search

warrant for Emily's cell phone and that he had looked through the contents of the phone. He documented certain text messages that he observed on Emily's cell phone, particularly those around the time that Winters was shot. He noted certain messages to a person that was listed in Emily's contact list under the name "Ryan." Elseman objected based on foundation to the State's questions regarding the content of text messages sent from Emily's cell phone to the contact listed as "Ryan" and from the contact listed as "Ryan" to Emily's cell phone. The court overruled Elseman's objections.

A coroner's physician who performed the autopsy on Winters testified that Winters had a gunshot wound that indicated a bullet had entered the right back side of Winters' head and exited left of the center of his chin. The physician testified that the bullet partially severed Winters' carotid artery, which caused significant hemorrhaging and ultimately caused Winters to bleed to death.

After the State rested its case, Elseman moved for a directed verdict on both counts. The district court sustained the motion with regard to the premeditated murder alternative for the first degree murder charge but overruled the motion as to felony murder and use of a deadly weapon to commit a felony charges. Elseman chose not to testify in his defense, and he rested his defense without presenting any evidence. Elseman renewed his motion for a directed verdict as to the remaining charges, and the court overruled the motion.

The court instructed the jury with regard to felony murder and use of a deadly weapon to commit a felony. After deliberations, the jury returned verdicts of guilty on both counts. The court thereafter sentenced Elseman to consecutive terms of imprisonment for life for the murder conviction and for 25 to 30 years for the use of a weapon conviction.

Elseman appeals his convictions.

ASSIGNMENTS OF ERROR

Elseman claims, renumbered and restated, that the district court erred (1) when it admitted evidence of the content of text messages sent to and from Elseman and (2) when it overruled his motions for directed verdict on felony murder and use of a

deadly weapon to commit a felony. He also claims that there was not sufficient evidence to support his convictions.

STANDARDS OF REVIEW

[1] Because authentication rulings are necessarily fact specific, a trial court has discretion to determine whether evidence has been properly authenticated. We review a trial court's ruling on authentication for abuse of discretion. *State v. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012), *cert. denied* ___ U.S. ___, 133 S. Ct. 158, 184 L. Ed. 2d 78.

[2] In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. *State v. Eagle Bull*, 285 Neb. 369, 827 N.W.2d 466 (2013). If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law, and a verdict may not be directed. *Id*.

[3] In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. *Id*. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id*.

ANALYSIS

The Content of Text Messages Was Authenticated.

Elseman first claims that the court erred when it admitted evidence regarding the content of text messages sent to and from Elseman's cell phone around the time of the killing because the text message evidence was admitted without satisfying the authentication requirement of Neb. Evid. R. 901,

Neb. Rev. Stat. § 27-901(1) (Reissue 2008). Rule 901 states, in relevant part: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." We determine that the authentication requirement was met, and there is no error in this regard.

[4] We have stated that rule 901 does not impose a high hurdle for authentication or identification. *State v. Taylor*, 282 Neb. 297, 803 N.W.2d 746 (2011). A proponent of evidence is not required to conclusively prove the genuineness of the evidence or to rule out all possibilities inconsistent with authenticity. *Id*. If the proponent's showing is sufficient to support a finding that the evidence is what it purports to be, the proponent has satisfied the requirement of rule 901(1). *Id*.

The evidence about which Elseman complains includes Emily's testimony regarding the content of text messages sent between herself and Elseman near the time Winters was killed. He also complains of evidence about which police investigators testified regarding text messages found on Emily's cell phone. Elseman's concern stems from the fact that it could not be ruled out that some other person sent or received the messages while using Elseman's cell phone.

In *State v. Pullens*, 281 Neb. 828, 800 N.W.2d 202 (2011), we considered a rule 901 challenge to the admission of evidence of the content of e-mail correspondence purportedly written by the defendant. We stated that e-mails could be authenticated by evidence such as

> the e-mail address[, t]he signature or name of the sender or recipient in the body of the e-mail[, e]vidence that an e-mail is a timely response to an earlier message addressed to the purported sender[, or] the contents of the e-mail and other circumstances [that] may be utilized to show its authorship.

281 Neb. at 860, 800 N.W.2d at 229. We further stated in *Pullens* that "[t]he possibility of an alteration or misuse by another of the e-mail address generally goes to weight, not admissibility." *Id*.

The reasoning we used with regard to the evidence of e-mail correspondence in *Pullens* applies to the rule 901 challenge to the evidence of the content of text messages in this case. Under rule 901, the State as the proponent of the evidence was not required to conclusively prove that Elseman authored the messages or to rule out that someone else may have written the messages using Elseman's cell phone. Courts in other jurisdictions have held that electronic messages such as e-mails and text messages may be authenticated by circumstantial evidence establishing that the evidence was what the proponent claimed it to be. See *State v. Thompson*, 777 N.W.2d 617 (N.D. 2010) (collecting cases). We determine that in this case, the State provided sufficient evidence to authenticate the text messages.

With regard to the specific evidence of which Elseman complains, we note that Emily testified regarding Elseman's telephone number based on her own memory, which was refreshed by looking at her cell phone. She also testified from her own memory regarding the content of text messages between herself and Elseman. It was clear that the foundation for Emily's testimony was her own memory regarding messages she had sent to and received from Elseman. Rule 901, upon which Elseman relies on appeal, did not prohibit Emily from testifying regarding her memory of messages sent between herself and Elseman.

Elseman also complains of the testimony of three law enforcement offiers involved in the investigation in this case—Herfordt, Ficenec, and Schneider. Herfordt testified only to the techniques he used to extract data from Emily's cell phone; he did not testify regarding the content of text messages, and Elseman made no objection based on foundation or authentication regarding Herfordt's testimony. Elseman notes and we recognize that Herfordt testified that data extracted from the cell phone did not indicate who actually sent the messages. The jury was allowed to take this testimony into consideration. Elseman shows no error in the court's allowing Herfordt's testimony.

Ficenec and Schneider testified regarding the content of text messages extracted from Emily's cell phone. The two

witnesses testified regarding the content of text messages and the telephone numbers from which and to which messages were sent. Although the number from which messages were sent and received was the number that Emily identified as belonging to Elseman, neither law enforcement officer testified that it was Elseman who sent the message, and both conceded that the data extracted from the cell phone could not verify who sent the message. The officers provided testimony regarding how they obtained the information extracted from the cell phone.

Because the officers testified regarding messages sent between only certain numbers and they did not purport to identify the specific persons who sent the messages, we determine that rule 901, upon which Elseman relies on appeal, did not prohibit the court from admitting such testimony. For purposes of rule 901, there was sufficient testimony to establish that the evidence was what the State claimed it to be—messages sent between certain telephone numbers. It was then within the jury's province to determine whether it could be reasonably inferred that Elseman sent or received the messages.

The authentication requirement of rule 901 was met, and we determine that the district court did not err on the basis of rule 901 when it admitted testimony by Emily and by the police officers regarding the content of the text messages. We reject this assignment of error.

There Was Sufficient Evidence to Support Elseman's Convictions.

Elseman claims that the district court erred when it overruled his motions for directed verdict on the charges of felony murder and use of a deadly weapon to commit a felony and, in any event, that there was not sufficient evidence to support his convictions. We find no merit to these claims.

In considering Elseman's assigned error regarding the amount of evidence, we note that where a defendant in a criminal case has moved for a directed verdict which is overruled and the defendant does not put on evidence, he or she has preserved the ruling for appeal, as Elseman did

in this case. Cf. *State v. Seberger*, 284 Neb. 40, 815 N.W.2d 910 (2012).

In this case, Elseman twice unsuccessfully moved for directed verdict. In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. *State v. Eagle Bull*, 285 Neb. 369, 827 N.W.2d 466 (2013). If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law, and a verdict may not be directed. *Id*. Referring to our statement of facts and as recited below in our sufficiency of the evidence analysis, there is evidence which would sustain a finding for the State against whom the motions for directed verdict were made. We cannot say as a matter of law that the case should not have been submitted to the jury. The overrulings of Elseman's motions for directed verdict were not error.

Elseman next challenges the sufficiency of the evidence. In his appellant's brief, Elseman makes only general assertions that there was not enough evidence to support his convictions. Elseman does not identify specific elements of either crime of which he was convicted that were not proved. Accordingly, we give an overview of the evidence and we find it sufficient.

Elseman was convicted of first degree murder and use of a weapon to commit a felony. The court directed a verdict in favor of Elseman with regard to the premeditated murder alternative for first degree murder; but with regard to the felony murder alternative, the jury was correctly instructed that in order to find Elseman guilty of first degree felony murder, it needed to find that Elseman intended to commit a robbery and that in the course of committing or attempting to commit that robbery, Elseman killed Winters. The jury was correctly instructed that in order to find Elseman guilty of use of a deadly weapon to commit a felony, it must find that Elseman committed first degree murder and that he intentionally used a deadly weapon in the commission of the murder.

There was testimony from witnesses in this case that, if believed by the jury, established that Elseman intended to rob Winters; that during the attempted commission of that robbery, Elseman shot and killed Winters; and that Elseman intentionally used a deadly weapon to shoot Winters. We note particularly the testimony of Emily, Northrop, and Palma recounted in our statement of facts. Such testimony indicated that Elseman and others formed a plan to rob Winters and that they took steps to carry out the robbery, including gaining access to Winters' house. There was evidence which shows that while in Winters' house to carry out the robbery, Elseman used a gun to shoot Winters and that Winters died from the gunshot wounds inflicted by Elseman.

The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Eagle Bull*, *supra*. The evidence admitted in this case was sufficient to support Elseman's convictions for first degree murder and use of a deadly weapon to commit a felony. We find no merit to this assignment of error.

CONCLUSION

Because the content of the text messages was properly authenticated under rule 901, we conclude that the district court did not err on this basis when it admitted evidence regarding the content of text messages between Elseman and Emily. We conclude the district court did not err when it overruled Elseman's motions for directed verdict. We further conclude that there was sufficient evidence to support Elseman's convictions. We affirm Elseman's convictions and sentences for first degree murder and use of a deadly weapon to commit a felony.

AFFIRMED.

McCORMACK, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. NICHOLAS J. ELY, APPELLANT.

841 N.W.2d 216

Filed January 3, 2014. No. S-12-1228.

1. **Criminal Law: Convictions: Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
2. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
3. **Evidence.** Determining the relevancy of evidence is a matter entrusted to the discretion of the trial court.
4. **Rules of Evidence: Other Acts: Appeal and Error.** It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 403 and 404(2), Neb. Rev. Stat. §§ 27-403 (Reissue 2008) and 27-404(2) (Cum. Supp. 2012), and the trial court's decision will not be reversed on appeal absent an abuse of discretion.
5. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
6. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
7. **Homicide: Intent: Presumptions.** The critical difference between felony murder and premeditated first degree murder is that the underlying felony takes the place of the intent to kill, or premeditated malice, and the purpose to kill is conclusively presumed from the criminal intent required for the underlying felony.
8. **Homicide: Intent.** A specific intent to kill is not required to constitute felony murder, only the intent to do the act which constitutes the felony in question.
9. **Appeal and Error.** An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.
10. **Evidence: Words and Phrases.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
11. **Homicide: Sentences.** When a defendant is sentenced to life imprisonment for first degree murder, the defendant is not entitled to credit for time served in custodial detention pending trial and sentence; however, when the defendant receives a sentence consecutive to the life sentence that has maximum and

minimum terms, the defendant is entitled to receive credit for time served against the consecutive sentence.

12. **Sentences.** A sentencing judge must separately determine, state, and grant the amount of credit on the defendant's sentence to which the defendant is entitled.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Affirmed as modified.

Mary C. Gryva, of Frank & Gryva, P.C., L.L.O., and Alan G. Stoler, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

STEPHAN, J.

Nicholas J. Ely was convicted by a jury of first degree murder and use of a deadly weapon to commit a felony. He was sentenced to life in prison on the murder conviction and to a consecutive prison term of 5 to 5 years on the weapon conviction. This is his direct appeal, which we hear pursuant to Neb. Rev. Stat. § 24-1106(1) (Reissue 2008). We find no error and therefore affirm.

FACTS

Around noon on July 6, 2011, a group of friends gathered at Ely's home. The group consisted of Ely, Marqus Patton, Ryan Elseman, and Emily G. Emily was 15 or 16 years old.

The group decided to obtain some marijuana and then go swimming at Patton's residence. Ely called Drake Northrop and asked him for a ride. Northrop picked up Ely, Emily, Patton, and Elseman, and Ely told Northrop they wanted to get some marijuana. Emily had previously purchased marijuana from Kristopher Winters, and she suggested they could obtain it from him. Emily directed Northrop to Winters' house.

En route to Winters' house, Northrop heard Elseman, Emily, and Ely discuss "going to go hit a lick," which is a street term for committing a robbery. Northrop agreed to take part. The three people in the back seat, Ely, Elseman, and Emily, said

they thought it would be an "easy lick" because Winters would not fight back.

Northrop parked near Winters' house, and everyone walked to the house. Initially, they planned to kick in the door, but because it was daylight, Emily said she would get them into the house in another manner. Northrop, Ely, Elseman, and Patton returned to the vehicle to wait for Emily to gain entry. The only objection made by anyone was Northrop, who suggested they should return when it was darker, but Patton and Ely said they should proceed.

Eric Brusha, a friend of Winters, arrived at Winters' house around noon and found Emily waiting in the driveway. Brusha did not know Emily. Brusha telephoned Winters to tell him Brusha was outside. Winters let Brusha into the house, and Emily followed him. Winters asked Emily what she wanted to purchase, and because Brusha knew Winters was a marijuana dealer, Brusha did not think the conversation was unusual.

Within 5 minutes, Emily sent a text message to Elseman informing him that she was inside Winters' house, that there were two other people there, and that the doors were unlocked. Northrop, Ely, Elseman, and Patton then went to Winters' house. They entered the basement of the house through a garage door. Elseman and Patton displayed weapons. Elseman entered first, followed by Patton, Ely, and then Northrop. Brusha did not recognize any of them as they entered, but he noticed that two of them were carrying black revolvers.

When Northrop, Ely, Elseman, and Patton entered, Winters and Brusha stood up. Elseman pointed a gun at Winters and said "you know what it is." Winters rushed at Elseman. A struggle ensued. During the struggle, Patton hit Winters in the head with the butt of a handgun, causing Winters to stumble backward. Winters then grabbed a chair and pushed Patton into a wall with it. Patton told Elseman to shoot Winters, and he did so, causing Winters to fall onto the steps leading upstairs. Winters then grabbed a stool or similar object and was approaching his assailants when he was shot a second time.

Winters' mother, Kellie Winters, was upstairs and heard a sound she thought was Winters' banging on the furnace, so

she went to the top of the stairs leading to the basement and called out to him. Kellie then went down the stairs where she found Winters holding his neck and Brusha yelling that Winters was hurt. Kellie ran outside and saw three males running away. She also saw a "young small girl," whom she did not recognize, standing in the driveway. This person was later determined to be Emily. Kellie yelled at Emily for not calling the 911 emergency dispatch service, and then Kellie struck Emily, knocking her down. Kellie then returned to the basement of the home where she found Winters, who was bleeding. Winters died before help arrived.

Northrop, Ely, Elseman, and Patton ran from the house to their vehicle immediately after the shooting. Emily left the area on foot. While fleeing, she received a text message from Elseman telling her to go to a nearby restaurant where Nicholas Palma would pick her up.

Brusha stayed at Winters' home and talked to the police. He then agreed to go to police headquarters for an interview and rode there with an officer. While riding with the officer, Brusha saw Emily walking on the street, and he identified her as the female who was in Winters' house at the time of the shooting. Police then apprehended Emily.

Meanwhile, Northrop dropped off Ely, Elseman, and Patton at Patton's residence. Patton told the others that he had been grazed by a bullet. When Palma could not find Emily, he called Ely, who told Palma to come to Patton's residence. Ely told Palma that they had tried to commit a robbery, but that things went wrong and a man was shot in the neck. Some days later, Ely called Palma and said he was leaving for Sioux City, Iowa. On July 11, 2011, Ely called Palma and asked him to pick him up in Sioux City and drive him back to Omaha, which Palma did.

Ely contacted two friends in Sioux City on July 9, 2011. Jacy Steiner said Ely called and said he was in town and needed to talk to someone because a robbery "went bad" in Omaha. Steiner met with Ely, and Ely said Emily had gone to the house to ask to use the telephone, and as Winters answered the door, people ran in, Winters fought back, and "somebody got shot." Ely told Steiner he had been in the vehicle, but he

did not say if he had gone into the house. Another friend of Ely's, Jacob Wilde, testified that he also met Ely in Sioux City on July 9. Ely told Wilde that he was in some trouble because he and some friends had gone into a house to rob someone, someone yelled "shoot," a shot went off, and then they all ran. Ely told Wilde that a girl had set up the robbery and that the person they were trying to rob was shot because he had put up a fight.

On the day before the robbery, a text message was sent from Ely's cell phone indicating that the sender was "'broke'" and had bills to pay. The message further stated, "'I ain't trying to go to prison for robbing but I feel like there ain't many other choices.'" Later the same day, another text message sent from Ely's cell phone stated: "'Wsup wita lick bro.'" A subsequent text in the same conversation, sent from Ely's cell phone, indicated that the sender needed money. And a text message from the same cell phone sent on the day of the homicide indicated that it was from "'Lunny,'" which was Ely's nickname, and that he was with Elseman, Emily, and two other persons.

An autopsy disclosed that one bullet went through Winters' neck, hitting the carotid artery on the right side. The pathologist who performed the autopsy testified that the cause of Winters' death was a gunshot wound to the neck which partially severed the carotid artery and led to a fatal hemorrhage.

ASSIGNMENTS OF ERROR

Ely assigns three errors. They are, restated, (1) that the evidence was insufficient to sustain the guilty verdicts, (2) that the district court erred in sustaining the State's motion in limine and excluding evidence of prior illegal conduct by Emily, and (3) that the district court erred in giving a flight instruction to the jury.

STANDARD OF REVIEW

[1] In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of

witnesses, or reweigh the evidence; such matters are for the finder of fact.[1] The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[2]

[2-4] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.[3] Determining the relevancy of evidence is a matter entrusted to the discretion of the trial court.[4] Likewise, it is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 403 and 404(2), Neb. Rev. Stat. §§ 27-403 (Reissue 2008) and 27-404(2) (Cum. Supp. 2012), and the trial court's decision will not be reversed on appeal absent an abuse of discretion.[5]

[5,6] Whether jury instructions given by a trial court are correct is a question of law.[6] When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.[7]

ANALYSIS

Sufficiency of Evidence

[7,8] The State prosecuted Ely under the theory of murder in the first degree, commonly known as felony murder. It is defined by statute as the killing of another "in the perpetration

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[1] *State v. Eagle Bull*, 285 Neb. 369, 827 N.W.2d 466 (2013).

[2] *Id.*

[3] *State v. Valverde*, 286 Neb. 280, 835 N.W.2d 732 (2013).

[4] *State v. Burton*, 282 Neb. 135, 802 N.W.2d 127 (2011).

[5] *State v. Castillas*, 285 Neb. 174, 826 N.W.2d 255 (2013); *State v. Payne-McCoy*, 284 Neb. 302, 818 N.W.2d 608 (2012).

[6] *State v. Valverde*, *supra* note 3.

[7] *Id.*

of or attempt to perpetrate any sexual assault in the first degree, arson, robbery, kidnapping, hijacking of any public or private means of transportation, or burglary."[8] The critical difference between felony murder and premeditated first degree murder is that the underlying felony takes the place of the intent to kill, or premeditated malice, and the purpose to kill is conclusively presumed from the criminal intent required for the underlying felony.[9] A specific intent to kill is not required to constitute felony murder, only the intent to do the act which constitutes the felony in question.[10]

It is undisputed that Winters was killed in the perpetration of a robbery and that Ely was present at all times during the robbery. But Ely argues on appeal that the evidence was insufficient to establish that he formed an intent to commit the robbery during which the killing occurred. Viewing the evidence in the light most favorable to the prosecution, as our standard of review requires,[11] we conclude that a rational trier of fact could have concluded beyond a reasonable doubt that Ely formed the intent to commit the robbery.

The text messages sent from Ely's cell phone the day before the homicide indicated the sender needed money and was considering robbery. Emily testified that while the group was on its way to Winters' house, they devised a plan to rob him. Northrop testified that he heard Ely say from the rear seat that they were "going to go hit a lick" and that Ely or one of the other rear seat passengers also said that the robbery would be easy because Winters would not fight back. Northrop also testified that when Emily signaled Elseman that she had entered Winters' house, he suggested that they should wait until dark before going in, but that Ely and Patton said they should go ahead. After the failed robbery attempt, Ely made statements to Palma and others indicating that he had

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[8] Neb. Rev. Stat. § 28-303(2) (Reissue 2008).

[9] *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000), *abrogated on other grounds, State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008).

[10] See *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006).

[11] See *State v. Eagle Bull, supra* note 1.

been involved in a robbery attempt which "went bad" because someone was shot.

From this evidence, a rational finder of fact could find beyond a reasonable doubt that Ely needed money and was contemplating robbery as a means of addressing this problem. A rational finder of fact could also conclude that en route to Winters' house with his companions, Ely was an active participant in the plan to "hit a lick," i.e., rob Winters during the purported drug transaction. Likewise, a finder of fact could conclude that Ely was an active and willing participant in the implementation of the plan which ultimately led to the fatal shooting. There is no evidence that Ely raised any objections to the robbery plan or attempted to extricate himself from its implementation by, for example, remaining in the car. Although Ely argues that the testimony of Emily and Northrop lacked credibility because they hoped for, but were not promised, leniency with respect to pending charges against them arising from the same incident, our standard of review precludes us from passing on the credibility of witnesses or reweighing the evidence.[12] Whatever the motive Emily and Northrop had for testifying, it was for the jury to determine their credibility. And we note that the jury was specifically instructed that because Emily and Northrop were claimed accomplices of Ely, their testimony should be examined closely "for any possible motive he or she might have to testify falsely." Accordingly, we conclude that the evidence was sufficient to support the verdict of guilty on the charge of felony murder.

[9] We note that while Ely's first assignment of error is worded broadly enough to challenge the sufficiency of the evidence to support his convictions on both the murder and weapons charges, he makes no argument specific to the latter. An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.[13] Because the sufficiency of the evidence to support Ely's conviction on the weapon charge is not preserved for our review, we do not address it.

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[12] See *id.*

[13] *Id.*; *State v. McGhee*, 280 Neb. 558, 787 N.W.2d 700 (2010).

Exclusion of Evidence of Prior Unlawful Conduct

Before trial, the State filed a motion in limine seeking to prevent Ely from adducing evidence that prior to July 6, 2011, Emily and Elseman had engaged in criminal conduct, specifically, robbing individuals who were selling marijuana. The State argued that the evidence would be improper character evidence in violation of § 27-404(1) and was not relevant under § 27-404(2). The State also asserted that the evidence did not comport with the statutory requirements for proving character evidence of a witness under Neb. Evid. R. 608, Neb. Rev. Stat. § 27-608 (Reissue 2008). Over Ely's objection, the district court sustained the motion. When Ely sought to elicit testimony from Emily at trial regarding prior illegal acts she had committed at the behest of Elseman, the court sustained the State's objection. We construe Ely's second assignment of error to encompass this ruling.

Ely argues on appeal, as he did below, that Emily's prior robberies were relevant and admissible under Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 2008), and § 27-404(2), because they were committed without his knowledge or involvement. He contends that Emily's prior unlawful conduct is relevant to motive, opportunity, and planning of the intended robbery of Winters, and that therefore, the evidence should have been admissible under § 27-404(2).

[10] We need not examine the admissibility of the proffered evidence under § 27-404(2), because we conclude that the fact that Emily and Elseman may have committed prior robberies without the knowledge or participation of Ely is irrelevant to any issue in this case. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.[14] The fact that Ely was not involved in prior unlawful conduct has no bearing, one way or another, on the issue of whether he committed the crimes he was charged with in this case. The district court did not abuse its discretion in sustaining

[14] § 27-401.

the State's motion in limine and its objection to Ely's attempt to elicit testimony from Emily regarding her prior unlawful conduct.

Flight Instruction

Lastly, Ely assigns error with respect to the following jury instruction given over his objection:

> You are instructed that the voluntary flight of a person immediately or soon after the occurrence of a crime is a circumstance, not sufficient of itself to establish guilt, but a circumstance nevertheless which the jury may consider in connection with all the other evidence in the case to aid you in determining the question of the guilt or innocence of such person.

He contends the instruction was prejudicial and prevented him from receiving a fair trial.

We first note that, in Ely's brief, while he objects to the entire instruction, he highlights certain language related to the timing of a defendant's voluntary flight. The record shows that the instruction given did not include that language. Nor does the record indicate that Ely objected to that specific language during the instruction conference.

We addressed the factual basis for a flight instruction in *State v. Pullens*,[15] stating:

> [F]or departure to take on the legal significance of flight, there must be circumstances present and unexplained which, in conjunction with the leaving, reasonably justify an inference that it was done with a consciousness of guilt and pursuant to an effort to avoid apprehension or prosecution based on that guilt.

In *Pullens*, the defendant declined to give police a detailed statement because he said he was drunk. Although he was taken to the police station for blood and DNA samples, he was not placed under arrest. Instead, the defendant was taken to a motel by a police officer, who said he would return in the morning to discuss the facts of the victim's death. But when the officer returned, the defendant was not in the motel. The

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[15] *State v. Pullens*, 281 Neb. 828, 862, 800 N.W.2d 202, 230 (2011).

defendant admitted that he knew he was a suspect when he fled, but claimed he left the motel to try to talk with a lawyer before speaking further with the police. We found no error in the trial court's giving the jury a flight instruction.

The record reflects that at some point after July 6, 2011, Ely went to Sioux City. While there, Ely talked to two friends about a robbery and said he was in trouble because of a shooting. This evidence supports a reasonable inference that Ely had a consciousness of guilt and was attempting to avoid apprehension. It was for the jury to determine whether Ely's actions demonstrated his guilt or innocence. We find no error in the giving of a flight instruction based on this record.

Credit for Time Served

[11,12] Finally, we find plain error in the allocation of credit for time served. Ely was sentenced to life in prison for the first degree murder conviction and to a period of 5 to 5 years in prison for the use of a deadly weapon conviction, to run consecutively to the life sentence. Ely was given credit for time served of 531 days against the sentence for first degree murder. When a defendant is sentenced to life imprisonment for first degree murder, the defendant is not entitled to credit for time served in custodial detention pending trial and sentence; however, when the defendant receives a sentence consecutive to the life sentence that has maximum and minimum terms, the defendant is entitled to receive credit for time served against the consecutive sentence.[16] A sentencing judge must separately determine, state, and grant the amount of credit on the defendant's sentence to which the defendant is entitled.[17]

Ely is entitled to receive credit for 531 days served, but the credit should be applied against the sentence for use of a deadly weapon rather than against the sentence for first degree murder. We therefore modify Ely's sentences by ordering that the credit for time served be applied against the sentence for use of a deadly weapon.

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[16] *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013).

[17] *Id.*

CONCLUSION

For the reasons discussed, we find no merit in any of Ely's assignments of error. However, we conclude that the district court incorrectly granted Ely credit for time served against his life sentence. We therefore modify the credit for time served by applying it to the sentence for use of a deadly weapon. In all other respects, we affirm the judgment of the district court.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. RANDY L. MORTENSEN, APPELLANT.

841 N.W.2d 393

Filed January 10, 2014. No. S-12-454.

1. **Judgments: Speedy Trial: Appeal and Error.** As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Statutes: Appeal and Error.** The meaning and interpretation of a statute are questions of law. An appellate court independently reviews questions of law decided by a lower court.
3. **Speedy Trial.** To calculate the deadline for trial under the speedy trial statutes, a court must exclude the day the State filed the information, count forward 6 months, back up 1 day, and then add any time excluded under Neb. Rev. Stat. § 29-1207(4) (Cum. Supp. 2012).
4. ____. Under the speedy trial statutes, it is axiomatic that an accused cannot and should not be permitted to take advantage of a delay where the accused is responsible for the delay by either action or inaction.
5. **Speedy Trial: Waiver.** The statutory right to a speedy trial is not unlimited and can be waived.
6. **Statutes: Appeal and Error.** An appellate court will not read into a statute a meaning that is not there.
7. **Speedy Trial: Waiver.** A defendant waives his or her statutory right to a speedy trial when the period of delay resulting from a continuance granted at the request of the defendant or his or her counsel extends the trial date beyond the statutory 6-month period.
8. **Speedy Trial: Waiver: Appeal and Error.** A defendant's motion to discharge based on statutory speedy trial grounds will be deemed to be a waiver of that right under Neb. Rev. Stat. § 29-1207(4)(b) (Cum. Supp. 2012) where (1) the filing of such motion results in the continuance of a timely trial to a date outside the statutory 6-month period, as calculated on the date the motion to discharge was filed, (2) discharge is denied, and (3) that denial is affirmed on appeal.

Petition for further review from the Court of Appeals, SIEVERS, PIRTLE, and RIEDMANN, Judges, on appeal thereto from the District Court for Butler County, MARY C. GILBRIDE, Judge. Judgment of Court of Appeals affirmed.

Robert J. Bierbower for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

WRIGHT, J.

NATURE OF CASE

In April 2012, Randy L. Mortensen filed his second motion to discharge based upon his statutory right to a speedy trial. The district court overruled the motion and found that the State had 28 days remaining to bring Mortensen to trial. Mortensen appealed, and the Nebraska Court of Appeals affirmed via a memorandum opinion. See *State v. Mortensen*, No. A-12-454, 2013 WL 2106665 (Neb. App. Apr. 23, 2013) (selected for posting to court Web site).

The State petitioned for further review, arguing that additional days should be excluded from the speedy trial calculation because Mortensen's motion was frivolous and prejudiced the State. We granted the State's petition for further review and, upon consideration, hold that Mortensen has waived his statutory right to a speedy trial.

SCOPE OF REVIEW

[1] As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *State v. Brooks*, 285 Neb. 640, 828 N.W.2d 496 (2013).

[2] The meaning and interpretation of a statute are questions of law. We independently review questions of law decided by a lower court. *Pinnacle Enters. v. City of Papillion*, 286 Neb. 322, 836 N.W.2d 588 (2013).

FACTS

On October 27, 2009, Mortensen was charged by information with assault while being incarcerated and of being a habitual criminal. The current appeal involves his second attempt to obtain absolute discharge based on statutory speedy trial grounds.

On October 25, 2010, Mortensen filed his first motion to discharge under the speedy trial statutes. The district court overruled the motion, and Mortensen appealed. In *State v. Mortensen*, 19 Neb. App. 220, 809 N.W.2d 793 (2011), the Court of Appeals affirmed the order denying absolute discharge and calculated that there were 112 days remaining in which to bring Mortensen to trial in the district court.

Mortensen sought further review of the Court of Appeals' decision, which this court denied on December 14, 2011. On January 11, 2012, the Court of Appeals issued its mandate, and on January 17, the district court entered judgment on the mandate. The district court scheduled Mortensen's trial for April 11.

On April 10, 2012, Mortensen filed a second motion to discharge based on the alleged violation of his statutory right to a speedy trial. The parties appeared before the district court for a hearing on April 11, the date originally scheduled for trial. The matter was taken under advisement, and on May 14, the court overruled Mortensen's motion. It concluded:

> This matter was set for trial well within the 112 remaining days after the entry of judgment on the mandate. [Mortensen] sets forth no basis for a determination that the speedy trial time as calculated by both this court and the Court of Appeals has expired. The motion is without basis. There remain 28 days to commence trial.

Mortensen timely appealed. He argued that the speedy trial clock should have resumed running on the date this court denied his petition for further review, not the date the district court entered judgment on the Court of Appeals' mandate. Accordingly, Mortensen based all of his speedy trial calculations upon the date of December 14, 2011, not January 17, 2012. He calculated that with an April 11 trial date, the State would have brought him to trial after 118 days and that it had

only 112 days to do so under the Court of Appeals' previous decision.

The Court of Appeals rejected Mortensen's argument as "clearly without merit and contrary to Nebraska law." *State v. Mortensen*, No. A-12-454, 2013 WL 2106665 at *2 (Neb. App. Apr. 23, 2013) (selected for posting to court Web site). It determined that the speedy trial clock began running again when the district court took action upon the Court of Appeals' mandate and that, consequently, the State still had 28 days to bring Mortensen to trial at the time Mortensen filed his second motion to discharge. The Court of Appeals held that the district court properly overruled Mortensen's motion to discharge.

On appeal, the State asked the Court of Appeals to exclude from the speedy trial clock the delay caused by Mortensen's allegedly frivolous motion to discharge. It argued that Mortensen's repeated, frivolous motions to discharge prejudiced the State and constituted good cause to exclude additional time from the statutory speedy trial clock under Neb. Rev. Stat. § 29-1207(4)(f) (Cum. Supp. 2012). The Court of Appeals concluded that the State should have raised this argument in a cross-appeal and declined to consider whether additional days should be excluded from the speedy trial clock.

The State moved for further review, claiming that the Court of Appeals' decision promoted abuse of the statutory speedy trial system by defendants. It argued that the Court of Appeals' opinion would "allow defendants to file repeated motions to discharge on frivolous speedy trial claims and, after appeal, be placed in potentially better positions than they were before. . . . The State is prejudiced, while defendants like Mortensen continue to play games with the speedy trial clock." Brief for appellee in support of petition for further review at 5-6. We granted the State's petition for further review.

ASSIGNMENT OF ERROR

On further review, the State assigns that the Court of Appeals erred in its calculation of the days remaining on the speedy trial clock for the State to bring Mortensen to trial.

ANALYSIS

Background

[3] This case involves Mortensen's statutory right to a speedy trial, which is separate from his constitutional right to a speedy trial. See *State v. Brooks*, 285 Neb. 640, 828 N.W.2d 496 (2013). The statutory right to a speedy trial is set forth in § 29-1207 and Neb. Rev. Stat. § 29-1208 (Cum. Supp. 2012). *Brooks*, *supra*. Under § 29-1207(1), "[e]very person indicted or informed against for any offense shall be brought to trial within six months, and such time shall be computed as provided in this section." To calculate the deadline for trial under the speedy trial statutes, a court must exclude the day the State filed the information, count forward 6 months, back up 1 day, and then add any time excluded under § 29-1207(4). *Brooks*, *supra*.

If a defendant is not brought to trial before the running of the time for trial as provided for in § 29-1207, as extended by excluded periods, he or she shall be entitled to his or her absolute discharge from the offense charged and for any other offense required by law to be joined with that offense. § 29-1208.

Purpose of Speedy Trial Statutes

The Legislature's stated purpose for enacting the speedy trial statutes was "[t]o effectuate the right of the accused to a speedy trial and the interest of the public in prompt disposition of criminal cases . . . ." Neb. Rev. Stat. § 29-1205 (Reissue 2008). Thus, one important purpose of the speedy trial statutes is "protection of an accused from a criminal charge pending for an undue length of time." *State v. Lafler*, 225 Neb. 362, 367, 405 N.W.2d 576, 580 (1987), *abrogated on other grounds, State v. Oldfield*, 236 Neb. 433, 461 N.W.2d 554 (1990). In addition to facilitating the rights of defendants, speedy trial statutes also serve public interests. See *State v. Sumstine*, 239 Neb. 707, 478 N.W.2d 240 (1991). By enactment of the statutes in question, the Legislature has recognized the social desirability of bringing the accused to trial at an early date. See *State v. Alvarez*, 189 Neb. 281, 202 N.W.2d 604 (1972).

Abuse of Speedy Trial Statutes

But as shown by the current appeal, our speedy trial statutes have been abused. The statutory right to a speedy trial has been used in some cases not to obtain relief from protracted criminal proceedings, but to hamper the State's ability to bring a defendant to trial in an efficient and timely manner. The circumstances surrounding Mortensen's motions to discharge illustrate this abuse.

Mortensen filed his first motion to discharge on October 25, 2010. At that time, his trial was set for October 26. As a result of the motion, the trial was continued and the parties argued the motion to discharge. The district court ruled that Mortensen's trial scheduled for October 26 would have been within the statutory 6-month period, and the Court of Appeals affirmed. See *State v. Mortensen*, 19 Neb. App. 220, 809 N.W.2d 793 (2011).

Mortensen filed a second motion to discharge on April 10, 2012, the day before trial was scheduled to begin. Instead of holding a trial on April 11, the court was required to continue the trial for a hearing on the motion to discharge. Again, the district court determined that the trial would have been within the statutory 6-month period if it had been held on April 11, as originally scheduled. The Court of Appeals again affirmed.

Both of Mortensen's motions to discharge had the significant result of postponing trial dates that he claimed were untimely when in fact both trial dates were set within the required 6 months. As a result of these motions, Mortensen has postponed his trial date for over 3 years from his first trial date.

[4] Under the speedy trial statutes, it is axiomatic that an accused cannot and should not be permitted to take advantage of a delay "where the accused is responsible for the delay by either action or inaction." *State v. Tucker*, 259 Neb. 225, 232, 609 N.W.2d 306, 312 (2000). See, also, *State v. Turner*, 252 Neb. 620, 564 N.W.2d 231 (1997); *Lafler, supra*; *State v. Craig*, 15 Neb. App. 836, 739 N.W.2d 206 (2007). Yet, defendants have used motions to discharge to delay trial for their benefit. Mortensen's case exemplifies the manner in

which defendants awaiting trial have manipulated the speedy trial system to delay trial and run out the speedy trial clock. Mortensen was charged by information in October 2009, but because of his motions to discharge, trial has been postponed for over 3 years since his first trial date—well beyond the statutory 6-month period.

We agree with the State's assertion that Mortensen has abused his statutory right to a speedy trial but has to date faced no repercussions for doing so. That has now changed with the recent amendment to § 29-1207. See 2010 Neb. Laws, L.B. 712, § 15.

Waiver by Filing Unsuccessful Motion to Discharge That Extended Trial Beyond 6-Month Period

[5] The statutory right to a speedy trial is not unlimited and can be waived. See, e.g., *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989). Under certain circumstances, waiver is prescribed by statute. See, § 29-1207(4)(b); Neb. Rev. Stat. § 29-1209 (Reissue 2008).

In *State v. Williams*, 277 Neb. 133, 761 N.W.2d 514 (2009) (Wright, J., concurring; Heavican, C.J., and Connolly, J., join), we pointed out the problems with the statutory speedy trial claims being asserted by defendants and the potential for abuse. In that case, the defendant's trial had been delayed for several years as a result of continuances granted at his request or with his consent, leaving only 34 days to bring him to trial. From those facts, we observed that "time keeps following the State, and the accused hopes the State will slip and fall victim to the 6-month trial clock." *Id.* at 148, 761 N.W.2d at 527. As a solution to such abuse, we recommended that the speedy trial statutes be amended to provide for a waiver of the statutory right to a speedy trial.

In response to the concerns expressed in *Williams, supra*, the Legislature amended § 29-1207(4)(b) to provide that a defendant's request to continue trial beyond the statutory 6-month period is deemed to be a waiver of the defendant's statutory right to a speedy trial. See L.B. 712, § 15. As amended, § 29-1207(4)(b) provides in relevant part that "[a]

defendant is deemed to have waived his or her right to speedy trial when the period of delay resulting from a continuance granted at the request of the defendant or his or her counsel extends the trial date beyond the statutory six-month period." The 2010 amendments also added language to § 29-1207(4)(b) that establishes an affirmative duty on the part of a defendant to end an indefinite continuance granted at his or her request. See L.B. 712, § 15. The amendments were operative July 15, 2010—several months before Mortensen filed his first motion to discharge. See *id*. But these amendments were not considered in Mortensen's first appeal.

[6] Section 29-1207(4)(b), as amended, provides for a permanent waiver of the statutory right to a speedy trial. There is no language in the statute that indicates an intent to limit the scope of the waiver provided therein, and "an appellate court will not 'read into a statute a meaning that is not there.'" See *Holdsworth v. Greenwood Farmers Co-op*, 286 Neb. 49, 58, 835 N.W.2d 30, 37 (2013), quoting *Blakely v. Lancaster County*, 284 Neb. 659, 825 N.W.2d 149 (2012). As such, the language of the amendments to § 29-1207(4)(b) indicates that the Legislature intended for the amendments to provide for a permanent waiver of a defendant's statutory right to a speedy trial.

Thus, reading § 29-1207(4)(b) as a whole, if a defendant requests a continuance that moves a trial date which has been set within the statutory 6-month period to a date that is outside the 6-month period, that request constitutes a permanent waiver of the statutory speedy trial right. The question is whether Mortensen's motion for discharge is a motion for continuance as described in the amendments. The amendments provided for a waiver of the right to a speedy trial when a continuance extends the trial date beyond the statutory 6-month period. Obviously, if a defendant's motion is sustained, the action is concluded and the defendant is discharged. But what is the effect of a motion for discharge that extends the trial date if the motion is overruled?

A motion to discharge is a request for a continuance, because it requires the court to dispose of the motion before trial can be commenced. As explained below, when a motion to discharge

is filed, trial cannot be held and must be continued in order for the court to consider and rule upon the motion. The motion functions as a request for a continuance, because the motion must be resolved by completion of the appeal process before the trial may be commenced. A motion which necessitates an adjournment is equivalent to an application for a continuance. 17 C.J.S. *Continuances* § 94 (2011).

Implicit within a motion to discharge is a request to continue the proceeding. There is no other procedure for the consideration of the motion. Under § 29-1209, the failure of the defendant to move for discharge prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to a speedy trial. But even though raised in a pretrial motion, the denial of discharge is a final and appealable order. See *State v. Gibbs*, 253 Neb. 241, 570 N.W.2d 326 (1997). The statutory right to a speedy trial would be "significantly undermined if appellate review of nonfrivolous speedy trial claims were postponed until after conviction and sentence." *Id.* at 245, 570 N.W.2d at 330. Consequently, if a defendant files a notice of appeal from a denial of the speedy trial claim, the trial court is divested of jurisdiction until the issue has been resolved by the appellate court and the mandate has been entered. See *State v. Abram*, 284 Neb. 55, 815 N.W.2d 897 (2012). Because an order denying discharge is appealable and a notice of appeal filed from the denial of discharge divests the trial court of jurisdiction, the motion for discharge has the immediate effect of continuing the proceedings. The procedures in our appellate jurisdiction require the matter to be continued pending resolution of a motion to discharge. Therefore, implicit within the motion for discharge is a request for a continuance until the issue has been completely resolved.

Where a motion to discharge cannot be finally resolved without postponing trial, the motion serves no purpose unless it acts as a request for a continuance. Trial cannot proceed and must be continued. Other courts have charged to a defendant the delay resulting from his or her motion to discharge, describing the delay as "a reasonable continuance to permit a

ruling of the motion." See *Russell v. State*, 624 S.W.2d 176, 179 (Mo. App. 1981).

This is precisely what has occurred in the instant case. Because of the manner in which Mortensen filed each of his motions to discharge, it was necessary to continue trial beyond the statutory 6-month period in order for the court to rule on the motion. Mortensen's first motion to discharge continued the trial scheduled for October 26, 2010. He filed that motion to discharge on October 25, and as a result, the October 26 trial date was used for a hearing on the motion to discharge instead of for trial. Mortensen engaged in identical tactics when filing his second motion to discharge. He waited until April 10, 2012, to file a second motion to discharge. On April 11, the parties argued the motion to discharge instead of starting trial. Because Mortensen filed each motion to discharge the day before the scheduled trial, it was impossible to resolve the issue within the statutory 6-month period and the trial was continued. Furthermore, because Mortensen's motions necessitated the continuance of trial scheduled within the 6-month requirement, we conclude that his motions were requests by Mortensen for a continuance.

Any delay resulting from Mortensen's motions to discharge must be construed as a period of delay resulting from a continuance granted at the request of a defendant under § 27-1207(4)(b). The language of the amendments to § 27-1207(4)(b) does not specify the reasons for which a continuance must be granted in order to result in a waiver of the statutory right to a speedy trial. As amended, § 27-1207(4)(b) provides that the continuance must be granted at the request of a defendant or his or her counsel and extend the trial date beyond the statutory 6-month period. In the absence of any language to the contrary, this broad language encompasses a continuance necessitated by a defendant's motion to discharge where the continuance has the effect of moving trial beyond the statutory 6-month period.

If, for purposes of argument, we assume, without deciding, that § 27-1207(4)(b) is ambiguous whether the waiver was meant to apply to a motion to discharge, the legislative history of the

2010 amendments clearly demonstrates that § 27-1207(4)(b) was amended specifically to address these types of delays. The language of waiver now found in § 27-1207(4)(b) was introduced by L.B. 1046, which was later amended into L.B. 712. See, L.B. 1046, Judiciary Committee, 101st Leg., 2d Sess. 3 (Jan. 21, 2010); Committee Statement, L.B. 712, A.M. 2288, 101st Leg., 2d Sess. 3 (January 20, 2010). At a committee hearing, the proponents of L.B. 1046 explained that the language of waiver was being proposed as a direct response to the problems identified in *State v. Williams*, 277 Neb. 133, 761 N.W.2d 514 (2009) (Wright, J., concurring; Heavican, C.J., and Connolly, J., join). See Judiciary Committee Hearing, L.B. 1046, 101st Leg., 2d Sess. 15-16 (Feb. 19, 2010). As stated in the hearing, the problems identified in *Williams*, *supra*, and intended to be addressed by the amendments included not only delays caused by traditional continuances, but also delays resulting from the filing of motions to discharge. See Judiciary Committee Hearing, *supra*. In light of this legislative history, § 27-1207(4)(b) must be interpreted as providing for a waiver of a defendant's speedy trial claim when a continuance necessitated by the defendant's motion to discharge moves trial beyond the statutory 6-month period.

In the instant case, both of the motions to discharge resulted in the continuance of trial from a date within the statutory 6-month period to a date outside the 6-month period, as calculated at the time Mortensen filed each motion. The practical effect of Mortensen's first motion to discharge was to move his trial beyond the 112 days remaining on the speedy trial clock when Mortensen filed the motion. Mortensen's second motion to discharge similarly required the continuance of a timely trial to a date outside the statutory 6-month period. There were 28 days left on the speedy trial clock when Mortensen filed his second motion to discharge. Over 1 year later, the continuance necessitated by this motion is still in effect pending resolution of this appeal. These are precisely the type of continuances that § 29-1207 was amended to address.

[7] A defendant waives his or her statutory right to a speedy trial "when the period of delay resulting from a continuance

granted at the request of the defendant or his or her counsel extends the trial date beyond the statutory six-month period." § 29-1207(4)(b). Mortensen's motions to discharge operated as requests for continuances, prevented what would have been timely trials from taking place, and delayed trial beyond the statutory 6-month period, as calculated on the date each motion was filed. If Mortensen's motions to discharge had identified actual violations of his statutory right to a speedy trial, he would have been discharged, making the delay irrelevant. But his motions to discharge did not succeed in obtaining discharge. Therefore, the filing of those motions is deemed to be a waiver of Mortensen's statutory speedy trial right under § 29-1207(4)(b).

Extending the waiver of § 29-1207(4)(b) to cover requests for continuances implicit in motions to discharge furthers the purposes of the speedy trial statutes. A primary purpose of the statutes is to promote a speedy trial, not to delay it. See, e.g., *State v. Lafler*, 225 Neb. 362, 405 N.W.2d 576 (1987), *abrogated on other grounds, State v. Oldfield*, 236 Neb. 433, 461 N.W.2d 554 (1990). The filing of a motion to discharge that identifies an actual violation of the statutory right to a speedy trial serves that purpose by ensuring that defendants are brought to trial within 6 months. If a defendant's statutory right to a speedy trial has actually been violated, a motion to discharge will provide relief in the form of a discharge. If successful, a motion to discharge does not delay trial, it completely avoids trial. But where motions to discharge are filed so as to continue the trial date beyond the statutory 6-month period without identifying a violation of the statutory right to a speedy trial, they have the effect of frustrating the purposes of the speedy trial statutes by continually delaying trial and, hence, are deemed to be a waiver of such rights.

RESOLUTION

[8] We hold that a defendant's motion to discharge based on statutory speedy trial grounds will be deemed to be a waiver of that right under § 29-1207(4)(b) where (1) the filing of such motion results in the continuance of a timely trial to a date outside the statutory 6-month period, as calculated on the date the

motion to discharge was filed, (2) discharge is denied, and (3) that denial is affirmed on appeal.

Mortensen waived his statutory right to a speedy trial under § 29-1207(4)(b) by filing unsuccessful motions to discharge that necessitated continuing trial beyond the statutory 6-month period. Thus, we affirm the Court of Appeals' decision affirming the judgment of the district court that overruled Mortensen's motion for discharge.

In the past, when affirming a district court's denial of discharge in similar cases, we have calculated the number of days remaining for the State to bring the defendant to trial once the district court reacquired jurisdiction of the case. See, e.g., *State v. Williams*, 277 Neb. 133, 761 N.W.2d 514 (2009). For this reason, the State asked the Court of Appeals to exclude additional days from the speedy trial clock. The Court of Appeals declined to consider this request, asserting that the State was required to submit such a request on cross-appeal. We note that in a criminal case, the State is not permitted to cross-appeal. See *State v. Halsey*, 232 Neb. 658, 441 N.W.2d 877 (1989). But in any event, an exact calculation of days remaining on the speedy trial clock is no longer required. Because Mortensen has waived his statutory right to a speedy trial under § 29-1207(4)(b), we are not required to calculate the days remaining to bring him to trial under § 29-1207. Once the district court reacquires jurisdiction over the cause, it is directed to set the matter for trial.

CONCLUSION

For the foregoing reasons, we affirm the decision of the Court of Appeals affirming the denial of Mortensen's motion to discharge. The district court is directed to set a date to bring Mortensen to trial once it reacquires jurisdiction over the cause.

AFFIRMED.

ML MANAGER, LLC, AND SOJ LOAN, LLC, APPELLANTS, V. DALE M. JENSEN AND VICKI S. JENSEN, APPELLEES, AND PIONEER VENTURES, LLC, GARNISHEE-APPELLEE.

842 N.W.2d 566

Filed January 10, 2014. No. S-12-1147.

1. **Garnishment: Appeal and Error.** Garnishment is a legal proceeding. To the extent factual issues are involved, the findings of a garnishment hearing judge have the effect of findings by a jury and, on appeal, will not be set aside unless clearly wrong.
2. **Statutes: Appeal and Error.** Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.
3. **Garnishment: Statutes.** Garnishment in aid of execution is a legal remedy unknown at common law and was created by statute.
4. **Garnishment: Statutes: Case Disapproved.** As set out in Neb. Rev. Stat. § 25-2218 (Reissue 2008), the code of civil procedure, which encompasses the entirety of chapter 25 of the Nebraska Revised Statutes, should not be strictly construed. To the extent that *NC+ Hybrids v. Growers Seed Assn.*, 219 Neb. 296, 363 N.W.2d 362 (1985), and *Spaghetti Ltd. Partnership v. Wolfe*, 264 Neb. 365, 647 N.W.2d 615 (2002), or other Nebraska cases, have held that chapter 25 statutes in derogation of the common law are to be strictly construed, they are now disapproved on those grounds.
5. **Garnishment: Statutes: Appeal and Error.** Because the garnishment statutes are part of chapter 25 of the Nebraska Revised Statutes, an appellate court views them under the general rules of statutory interpretation.
6. **Statutes: Appeal and Error.** The rules of statutory interpretation require an appellate court to give effect to the entire language of a statute, and to reconcile different provisions of the statutes so they are consistent, harmonious, and sensible.
7. ____: ____. Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
8. ____: ____. An appellate court will give effect to all parts of a statute and avoid rejecting as superfluous or meaningless any word, clause, or sentence.
9. **Statutes.** It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language.
10. **Garnishment: Legislature: Intent.** The Nebraska Legislature sought to protect a garnishee from the often unnecessary and sometimes oppressive litigation by demanding an expeditious disposition of garnishment proceedings.
11. **Garnishment: Notice.** A garnishee is not required to provide notice, through service or any other means, of the interrogatory answers to the garnishor.

Appeal from the District Court for Lancaster County: STEPHANIE F. STACY, Judge. Affirmed.

Joel Bacon, of Keating, O'Gara, Nedved & Peter, P.C., L.L.O., for appellants.

Terry R. Wittler and Gregory S. Frayser, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for garnishee-appellee.

HEAVICAN, C.J., CONNOLLY, STEPHAN, MILLER-LERMAN, and CASSEL, JJ.

PER CURIAM.

NATURE OF CASE

This is an appeal from an order overruling an "Objection to Garnishee's Answers to Interrogatories" on the finding that the objection was filed after the 20-day time period set forth in Neb. Rev. Stat. § 25-1030 (Reissue 2008). ML Manager, LLC, and SOJ Loan, LLC (collectively ML Manager), contend that under § 25-1030, the 20-day time period should not begin until the garnishor receives notice. The issue presented as a matter of first impression is whether a garnishee must serve the garnishor with its interrogatory answers.

BACKGROUND

ML Manager obtained a valid default judgment against Dale M. Jensen and Vicki S. Jensen for the principal amount of $52,024,377.16. On April 24, 2012, ML Manager had a summons and order of garnishment in aid of execution issued to Pioneer Ventures, LLC. Along with the summons, ML Manager served Pioneer Ventures with interrogatories. The summons stated that "[y]ou are required by law to answer the attached Interrogatories and file them in this court within 10 days of service of this Summons upon you."

On April 30, 2012, Pioneer Ventures timely filed its answers to the interrogatories with the clerk of the court. ML Manager was not served with the answers, but independently learned of the answers on May 7, 2012. On May 25, ML Manager filed an objection to the answers to interrogatories. ML Manager requested a hearing on the issues raised in its objection.

A hearing was held on the objections. No evidence was presented, and there is no bill of exceptions. In its order, the trial court ruled that ML Manager's objection was untimely under

§ 25-1030, because the objection was filed more than 20 days after Pioneer Ventures had filed its answers on April 30, 2012. ML Manager now appeals.

ASSIGNMENTS OF ERROR

ML Manager assigns, restated and summarized, that the trial court erred by (1) ruling that the 20-day time limit of § 25-1030 began to run from when the answer was filed and not when ML Manager received actual notice, (2) not requiring service of the answers by Pioneer Ventures upon ML Manager, and (3) not permitting the objection even if the 20-day period had expired.

STANDARD OF REVIEW

[1] Garnishment is a legal proceeding. To the extent factual issues are involved, the findings of a garnishment hearing judge have the effect of findings by a jury and, on appeal, will not be set aside unless clearly wrong.[1]

[2] Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.[2]

ANALYSIS

ML Manager argues that the 20-day period to file an application should not have begun until ML Manager had received actual notice that the interrogatory answers had been filed. In support of this contention, ML Manager argues that (1) the garnishment statutes require service and notice, (2) the rules of civil procedure require a garnishee to serve its answers, and (3) ML Manager should be excused for failing to file the objection within 20 days. We address these arguments in that order.

[3] Garnishment in aid of execution is a legal remedy unknown at common law and was created by statute.[3] Generally, in cases where a court enters judgment in favor of a creditor, the judgment creditor may, as garnishor, request that the court

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[1] *Spaghetti Ltd. Partnership v. Wolfe*, 264 Neb. 365, 647 N.W.2d 615 (2002).

[2] *DMK Biodiesel v. McCoy*, 285 Neb. 974, 830 N.W.2d 490 (2013).

[3] See *Spaghetti Ltd. Partnership v. Wolfe*, *supra* note 1.

issue a summons of garnishment against any person or business owing money to the judgment debtor.[4] As garnishee, the person or business owing money to the judgment debtor must answer written interrogatories furnished by the garnishor to establish whether the garnishee holds any property or money belonging to or owed to the judgment debtor.[5] The garnishee is required to answer within 10 days from the date of service.[6] If the garnishor is not satisfied with the interrogatory answers, it has 20 days to file an application for determination of the liability of the garnishee.[7] Upon establishing through pleadings and trial that the garnishee holds property or credits of the judgment debtor, the garnishee must then pay such amounts to the court in satisfaction of the garnishor's judgment against the judgment debtor, subject to certain statutory exceptions with regard to wages.[8]

To determine whether the garnishee is required to provide service or notice, we must look to the statutes. Neb. Rev. Stat. § 25-1026 (Reissue 2008) explains how the garnishee should answer the interrogatories and states:

> The garnishee shall answer, under oath, all the interrogatories put to him touching the property of every description and credits of the defendant in his possession or under his control at the time of the service of the summons and interrogatories, and he shall disclose truly the amount owing by him to the defendant, whether due or not, and, in case of a corporation, any stock therein held by or for the benefit of the defendant, at the time of the service of the summons and interrogatories. The fee for filing of answer may be taxed and collected in the same manner as other costs in such proceedings.

Section 25-1056 specifies that "[t]he summons shall be returnable within ten days from the date of its issuance and

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[4] See Neb. Rev. Stat. § 25-1056 (Reissue 2008).

[5] *Id.*

[6] *Id.*

[7] See § 25-1030.

[8] *Spaghetti Ltd. Partnership v. Wolfe*, *supra* note 1.

shall require the garnishee to answer within ten days from the date of service upon him or her." If the garnishee fails to answer, Neb. Rev. Stat. § 25-1028 (Reissue 2008) states the garnishee "shall be presumed to be indebted to the defendant." If the garnishee answers, § 25-1030 gives the garnishor an opportunity to challenge the garnishee's answers to the interrogatories. Section 25-1030 states, in its entirety:

> If the garnishee appears and answers and his or her disclosure is not satisfactory to the plaintiff, or if he or she fails to comply with the order of the court, by delivering the property and paying the money owing into court, or giving the undertaking required in section 25-1029, the plaintiff may file an application within twenty days for determination of the liability of the garnishee. The application may controvert the answer of the garnishee, or may allege facts showing the existence of indebtedness of the garnishee to the defendant or of the property and credits of the defendant in the hands of the garnishee. The answer of the garnishee, if one has been filed, and the application for determination of the liability of the garnishee shall constitute the pleadings upon which trial of the issue of the liability of the garnishee shall be had. If the plaintiff fails to file such application within twenty days, the garnishee shall be released and discharged.

Rules of Statutory Interpretation for Garnishment Statutes

Under our traditional rules of interpretation, if a statute is in derogation of common law, it is to be strictly construed.[9] Starting in 1985, we have repeatedly held that, being in derogation of common law, garnishment statutes should be strictly construed.[10] But in doing so, we ignored Neb. Rev. Stat.

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[9] *Dykes v. Scotts Bluff Cty. Ag. Socy.*, 260 Neb. 375, 617 N.W.2d 817 (2000).

[10] *NC+ Hybrids v. Growers Seed Assn.*, 219 Neb. 296, 363 N.W.2d 362 (1985). See, *Spaghetti Ltd. Partnership v. Wolfe*, *supra* note 1; *J.K. v. Kolbeck*, 257 Neb. 107, 595 N.W.2d 875 (1999); *Torrison v. Overman*, 250 Neb. 164, 549 N.W.2d 124 (1996).

§ 25-2218 (Reissue 2008), which states that "[t]he rule of the common law that statutes in derogation thereof are to be strictly construed has no application to this code." The predecessor to § 25-2218 was originally codified in 1867, as part II, § 1, of Nebraska laws entitled "Code of Civil Procedure." At that time, § 1 had a second sentence that stated, "[i]ts provisions, and all proceedings under it, shall be liberally construed, with a view to promote its object, and assist the parties in obtaining justice."[11] This second sentence was removed when the language was codified under § 25-2218. In 1883, this court held that § 1 required the court to reject strict constructionism when interpreting any statute in the code of civil procedure.[12] And until 1985, § 1 and its successors, including § 25-2218, were accordingly used to reject strict construction of statutes within the code of civil procedure in favor of the standard rules of construction.[13]

In 1985, this court, relying on cases from Michigan and Wisconsin, applied strict construction to garnishment statutes for the first time.[14] In doing so, we seemingly overlooked § 25-2218. This was error.

[4] As set out in § 25-2218, the code of civil procedure, which encompasses the entirety of chapter 25 of the Nebraska Revised Statutes, should not be strictly construed. To the extent that *NC+ Hybrids v. Growers Seed Assn.*[15] and *Spaghetti Ltd. Partnership v. Wolfe*,[16] or other Nebraska cases, have held that Chapter 25 statutes in derogation of the common law are to be strictly construed, they are now disapproved on those grounds.

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[11] Rev. Stat. pt. II, § 1, p. 394 (1867).

[12] *Kepley v. Irwin*, 14 Neb. 300, 15 N.W. 719 (1883).

[13] See, e.g., *Kearney Electric Co. v. Laughlin*, 45 Neb. 390, 63 N.W. 941 (1895); *Rine v. Rine*, 91 Neb. 248, 135 N.W. 1051 (1912); *McIntosh v. Standard Oil Co.*, 121 Neb. 92, 236 N.W. 152 (1931); *Orchard & Wilhelm Co. v. North*, 125 Neb. 723, 251 N.W. 895 (1933); and *Rogers v. Western Electric Co.*, 179 Neb. 359, 138 N.W.2d 423 (1965).

[14] *NC+ Hybrids v. Growers Seed Assn.*, *supra* note 10.

[15] *Id.*

[16] *Spaghetti Ltd. Partnership v. Wolfe*, *supra* note 1.

[5-9] Because the garnishment statutes are part of chapter 25, we will view them under our general rules of statutory interpretation. The rules of statutory interpretation require an appellate court to give effect to the entire language of a statute, and to reconcile different provisions of the statutes so they are consistent, harmonious, and sensible.[17] Statutory language is to be given its plain and ordinary meaning, and this court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[18] We will give effect to all parts of a statute and avoid rejecting as superfluous or meaningless any word, clause, or sentence.[19] It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language.[20]

Interpretation of Garnishment Statutes

A plain reading of § 25-1030 establishes that if the garnishee appears and answers, the plaintiff must file an application within 20 days. Nowhere in § 25-1030 is the garnishee required to serve its interrogatory answers or to provide any notice to the garnishor. Likewise, § 25-1026, which sets the requirements for how the garnishee shall answer the interrogatories, does not require service or notice.

ML Manager argues that § 25-1030 requires actual notice, because a garnishee's answer can only be "not satisfactory" to the garnishor if the garnishor knows the garnishee's answer. Such an interpretation is flawed because the inclusion of that language is to indicate why a garnishor would want to file an application for a trial. There is no indication in the remaining parts of the statute to indicate that the language was intended to create an actual notice requirement. It seems unlikely that the Legislature would intend to create a notice requirement for the 20-day time period so inconspicuously.

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[17] *Amen v. Astrue*, 284 Neb. 691, 822 N.W.2d 419 (2012).

[18] *Id.*

[19] See *id.*

[20] *Id.*

In all other instances in the garnishment statutes, the Legislature has been explicit when it requires service and notice. Neb. Rev. Stat. § 25-1011(1) (Cum. Supp. 2012) states that "[t]he summons and order of garnishment and the interrogatories in duplicate, a notice to judgment debtor form, and a request for hearing form shall be served upon the garnishee in the manner provided for service of a summons in a civil action." Neb. Rev. Stat. § 25-1030.01 (Reissue 2008) requires the plaintiff to provide notice of a trial to the garnishee and defendants. Throughout the statutory scheme, the Legislature was explicit as to service by the garnishor, but was silent on requiring service of the interrogatory answers by the garnishee. This indicates that the Legislature intended to create separate requirements for the garnishor and garnishee on the issue of service and notice.

[10] We have previously stated that the statutory language indicates that the purpose of § 25-1030 was to create an expedited garnishment proceeding.[21] As a stranger to the proceedings in which a judgment has been obtained, a garnishee is normally an innocent third party exposed to inconvenience and hazards or expense of extended litigation.[22] The Nebraska Legislature sought to protect a garnishee from this often unnecessary and sometimes oppressive litigation by demanding an expeditious disposition of proceedings.[23] To achieve prompt disposition, the garnishment statutes have specified a relatively short time for counteraction by a judgment creditor or garnishor in the event of any dissatisfaction with a garnishee's disclosure contained in answers to interrogatories, namely, a written application filed within 20 days in order to determine liability where a garnishee's answers negate a debt, property, or credit due the judgment debtor from the garnishee.[24] While garnishment affords the plaintiff a remedy or means to satisfy a judgment, the garnishment statutes also

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[21] *NC+ Hybrids v. Growers Seed Assn.*, *supra* note 10.

[22] *Id.*

[23] *Id.*

[24] *Id.*

embody a remedy and mechanism for the garnishee to obtain resolution of a question concerning the garnishee's liability to avoid unnecessary litigation.[25] Therefore, we find that a purpose of § 25-1030 is to provide an expeditious disposition for the garnishee without imposing an additional burden of requiring the garnishee to serve the garnishor with answers.

ML Manager argues that we should interpret the garnishment statute in a manner consistent with notions of due process. In general terms, a litigant has the due process right to adequate notice or of the opportunity to be heard.[26] We have stated that if a statute is constitutionally suspect, we endeavor to interpret it in a manner consistent with the Constitution.[27] ML Manager argues that notions of due process would be violated if the statute does not require service.

We disagree. Although the statute does not require the garnishee to provide notice through service, the statute does provide adequate notice and an opportunity to be heard. After the garnishor serves the garnishee with the summons and interrogatories, the garnishee is required to answer within 10 days.[28] On day eleven, the garnishor can ask the clerk of the court whether an answer has been filed. This simple procedure provides the garnishor with adequate notice. The garnishor then has the opportunity to file an application that challenges the filed answers and requests a hearing to settle the matter. Even if the answer had been filed by the garnishee on the day it received the interrogatories, the garnishor on day eleven would have 9 days to file its application. This procedure provides the garnishor with an opportunity to be heard.

[11] Therefore, we find that the garnishment statutes, when read as a whole, do not require the garnishee to provide notice, through service or any other means. This construction

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[25] *NC+ Hybrids v. Growers Seed Assn.*, 228 Neb. 306, 422 N.W.2d 542 (1988).

[26] See *Marshall v. Wimes*, 261 Neb. 846, 626 N.W.2d 229 (2001).

[27] *State v. Sinica*, 220 Neb. 792, 372 N.W.2d 445 (1985).

[28] See § 25-1056.

is consistent with the meaning of the statute, the Legislature's intent, and the notions of due process.

Next, ML Manager argues that even if the garnishment statutes do not require notice and service, service is required by Nebraska's rules of civil procedure. ML Manager directs our attention to Neb. Ct. R. Pldg. § 6-1105(a) (rev. 2008), which states that "every pleading subsequent to the original complaint . . . shall be served upon each of the parties." An answer to an interrogatory is a pleading.[29] Thus, ML Manager argues the 20-day period could not have run, because the answer was not served.

However, Neb. Ct. R. Pldg. § 6-1101 states that the rules of civil procedure "apply to the extent not inconsistent with statutes governing such matters." It continues that the rules of civil procedure "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."

Having established that the garnishment statutes do not require service, we find that § 6-1101 of the rules of pleading is inconsistent with the statutes that govern this matter. Section 6-1101 requires this court to apply the more specific garnishment statutes, which do not require service. This construction is consistent with the rules of civil procedure's purpose of securing a just, speedy, and inexpensive determination of every action.

Finally, ML Manager argues that the trial court abused its discretion in refusing to permit the filing of the objection after the 20 days had passed. ML Manager argues that the facts of this case establish excusable neglect that should entitle it to relief.

ML Manager cites *Underwriters v. Cannon*,[30] a 1975 case from the Oklahoma Supreme Court. In *Underwriters*, the plaintiff failed to answer within 20 days and filed an "'APPLICATION FOR EXTENSION OF TIME'" after the

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[29] See *NC+ Hybrids v. Growers Seed Assn.*, *supra* note 25.

[30] *Underwriters v. Cannon*, 538 P.2d 210 (Okla. 1975).

deadline had expired.[31] The trial court granted the extension of time. The Oklahoma Supreme Court affirmed and stated that nothing "persuades us to depart from our position that the extension of time within which to file pleadings in a garnishment proceeding is a matter properly within the sound judicial discretion of the trial court."[32]

Without deciding whether our garnishment statutes would permit a trial court to grant an extension of time to file the objection, we find that the trial court did not abuse its discretion in denying ML Manager's request to excuse the late filing. ML Manager has presented no valid reason, other than ignorance, as to why it failed to file its objection on time. ML Manager received actual notice of the answer well before the 20-day period had expired and had ample time to answer. The trial court did not abuse its discretion in denying the extension.

CONCLUSION

We hold that the garnishment statutes do not require the garnishee to serve, or give notice to, the garnishor of the interrogatory answers. Such an interpretation is consistent with the plain meaning of the statutes, the statutes' purpose to lessen the burden on the garnishee as an innocent third party, and the basic notions of due process. The decision of the trial court is affirmed.

AFFIRMED.

MCCORMACK, J., participating on briefs.
WRIGHT, J., not participating.

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[31] *Id.* at 211.

[32] *Id.* at 212.

KEITH HARRIS, APPELLANT, V. ROBERT E. O'CONNOR, JR., APPELLEE.

842 N.W.2d 50

Filed January 10, 2014. No. S-13-103.

1. **Summary Judgment.** Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Malpractice: Attorney and Client: Negligence: Proof: Proximate Cause: Damages.** In a civil action for legal malpractice, a plaintiff alleging professional negligence on the part of an attorney must prove three elements: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss to the client.
4. **Malpractice: Attorney and Client: Negligence: Proof.** When a plaintiff asserts attorney malpractice in a civil case, the plaintiff must show that he or she would have been successful in the underlying action but for the attorney's negligence.

Appeal from the District Court for Douglas County: TIMOTHY P. BURNS, Judge. Affirmed.

Thomas D. Wulff and Thomas J. Freeman, of Wulff & Freeman, L.L.C., for appellant.

William M. Lamson, Jr., and Jason W. Grams, of Lamson, Dugan & Murray, L.L.P., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

HEAVICAN, C.J.

I. INTRODUCTION

Appellant, Keith Harris, brought this action against appellee, Robert E. O'Connor, Jr., for professional malpractice. O'Connor's motion for summary judgment was granted. We affirm.

II. FACTUAL BACKGROUND

Harris, a former captain with the Omaha Police Department, retained O'Connor, an attorney, to represent him in several

actions, including one to obtain disability benefits from the city of Omaha, Nebraska.

A hearing on Harris' petition for benefits was held before the City of Omaha Police and Fire Retirement System Board of Trustees (Board) on January 20, 2011. At the hearing, O'Connor presented five exhibits relating to Harris' medical records and opinions from Harris' treating medical providers. The minutes note that O'Connor asked the Board to take judicial notice of its own rules, regulations, and applicable ordinances. There is no indication either in the minutes or in the audio recording of the hearing whether the Board would do so. Harris' application was denied.

Harris met with O'Connor to discuss how to proceed. Specifically, the two discussed whether the decision of the Board should be appealed to the district court. Harris and O'Connor held e-mail conversations after this meeting. At some point during these conversations, O'Connor expressed concern about whether the record was properly made before the Board because the applicable ordinances were not offered into evidence. According to O'Connor's affidavit, he had concluded prior to the hearing that he could ask the Board to take judicial notice of the applicable ordinances and then request the inclusion of those ordinances in his praecipe for transcript to the district court.

But based on conversations with the Omaha city clerk, O'Connor later decided that going back before the Board might be the better option. In an e-mail dated February 9, 2011, O'Connor wrote to Harris: "I talked first to . . . the City Clerk. He is of the opinion that we should go back to the Board, and offer the Ordinances physically. While there is no rule that says you have to do it that way, he thinks it [is] safer."

In response, Harris indicated that he would "like to go with the safest most certain route" and also inquired as to the "statu[t]e of limitations . . . on the appeal of the . . . Board's decision." O'Connor indicated that he would have to "look again at the limitation period for filing in District Court. But, if we are going back to the Board, it doesn't make any difference. Whatever the clock is, it starts over when we go back."

Harris answered that he "think[s] we should be safe rather than sorry and go to District Court with the January 20th . . . Board Hearing safely inside our limitation lines." O'Connor responded, "I do not understand this email. If we appeal now, we do not go back to the Board . . . . Which do you wan[t]?" Harris replied:

> E-mail is a difficult medium. (smiling)
>
> I was responding to the following part of your e-mail:
>
> "*I have to look again at the limitation period for filing in District Court. But, if we are going back to the Board, it doesn't make any difference. Whatever the clock is, it starts over when we go back.*"
>
> I agree with the path we have set. I am not asking to change it over-all. The thought I am conveying is that we should use January 20th (The first . . . Board meeting date) as our date for satisfying the statute of limitations. (Once that date is determined[.]) It seems to me that using the January 20th date is the safest way to go so District Court can not [sic] say they can't consider things that occurred in the meeting on the 20th due to the date being beyond the statute of limitations. (It is a redundancy, possibly, but I like fail safe planning[.])

O'Connor answered, "[s]o, basically, we agree, some days email sucks."

Harris terminated his relationship with O'Connor on February 28, 2011. At the time of the termination, no appeal had been filed from the Board's decision, nor had the Board been asked to rehear its denial of Harris' petition for disability benefits.

Harris filed suit against O'Connor for professional malpractice on February 8, 2012; an amended complaint was filed on December 4. In his amended complaint, Harris alleged that O'Connor committed legal malpractice when he failed to (1) investigate the proper procedure to enter an ordinance into evidence, (2) introduce the ordinance into evidence at the hearing before the Board, and (3) file an appeal of the Board's denial to the district court.

O'Connor filed for summary judgment. At the hearing on the motion for summary judgment, Harris offered expert

testimony on the procedures to be followed when preserving a record for appellate purposes. Following the hearing, O'Connor's motion for summary judgment was granted. In granting the motion, the district court reasoned that Harris could not prevail on his claim unless he could show that he would have been successful in the underlying action but for O'Connor's alleged negligence. The district court found that in this case, Harris never directed O'Connor to file an appeal of the Board's decision with the district court. The court also noted that O'Connor had properly preserved the record before the Board such that an appeal would have been possible. In reaching the latter conclusion, the district court noted that it disagreed with Harris' expert, whose opinion was that the record was not preserved. The district court also noted that the expert's testimony was not "allowed," because the question was a legal one.

III. ASSIGNMENTS OF ERROR

On appeal, Harris assigns, restated and consolidated, that the district court erred in (1) granting O'Connor's motion for summary judgment and (2) "refusing to allow evidence from experts on the issue of legal malpractice."

IV. STANDARD OF REVIEW

[1] Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[1]

[2] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.[2]

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[1] *Southwind Homeowners Assn. v. Burden*, 283 Neb. 522, 810 N.W.2d 714 (2012).

[2] *Churchill v. Columbus Comm. Hosp.*, 285 Neb. 759, 830 N.W.2d 53 (2013).

V. ANALYSIS

1. Motion for Summary Judgment

Harris first assigns that the district court erred in granting O'Connor's motion for summary judgment.

[3,4] In a civil action for legal malpractice, a plaintiff alleging professional negligence on the part of an attorney must prove three elements: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss to the client.[3] When a plaintiff asserts attorney malpractice in a civil case, the plaintiff must show that he or she would have been successful in the underlying action but for the attorney's negligence.[4]

In Harris' amended complaint, he alleged that O'Connor was negligent in three ways: failing to investigate how to preserve the record before the Board, failing to properly preserve that record, and failing to appeal the Board's decision to the district court.

(a) Appellate Record

Harris alleges first that O'Connor failed to investigate and properly preserve the record before the Board for appellate review.

The facts show that O'Connor asked the Board to take judicial notice of the applicable ordinances. The Board did not audibly respond to this request. But our case law makes it clear that the Board was required to take such notice of its own ordinances.[5] And because the Board adjudicated Harris' petition on the merits, the Board obviously took judicial notice of the ordinances in question.

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[3] *Young v. Govier & Milone*, 286 Neb. 224, 835 N.W.2d 684 (2013).

[4] See *Bowers v. Dougherty*, 260 Neb. 74, 615 N.W.2d 449 (2000).

[5] *Foley v. State*, 42 Neb. 233, 60 N.W. 574 (1894). See *State v. Lewis*, 240 Neb. 642, 483 N.W.2d 742 (1992) (Caporale, J., dissenting). Cf., *Owen, Administrator v. Moore*, 166 Neb. 226, 88 N.W.2d 759 (1958); *State v. Hohensee*, 164 Neb. 476, 82 N.W.2d 554 (1957); *Spomer v. Allied Electric & Fixture Co.*, 120 Neb. 399, 232 N.W. 767 (1930).

And the ordinances were properly preserved for appeal. The ordinance rule provides that an appellate court

> cannot undertake to notice the ordinances of all the municipalities within its jurisdiction, nor to search the records for evidence of their passage, amendment or repeal. A party relying upon such matters must make them a part of the bill of exceptions, or in same manner present them as a part of the record.[6]

In this case, it is undisputed that O'Connor did not offer the ordinances as exhibits. But this court held in *State v. Bush*[7] that the responsibility of preserving the ordinances in the record can be "met by a praecipe requesting that a copy of the ordinance be included in the transcript prepared by the clerk of the county court when a notice of appeal is filed." In this case, the record shows that the custodian of those ordinances is the Omaha city clerk; the Omaha city clerk is also the custodian of the records of the Board. In this instance, then, the Omaha city clerk could produce both the ordinances and the Board records when submitting documents to fulfill the requests made in the praecipe.

Harris argues that the "exception" to the ordinance rule is applicable only in criminal cases. But he cites to no authority for this position, and we decline to make such a distinction. The fact that *Bush* is a criminal case is insufficient to suggest that this "exception" is applicable only in criminal cases.

Harris' contention that O'Connor failed to investigate and preserve the record for appellate purposes is without merit. Harris is unable to show that O'Connor's actions constituted neglect, and accordingly, summary judgment was appropriate.

(b) Appeal

Harris also alleged that O'Connor committed malpractice when he failed to file an appeal of the Board's January 20,

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[6] *Steiner v. State*, 78 Neb. 147, 150, 110 N.W. 723, 724 (1907). See, also, *State v. Abbink*, 260 Neb. 211, 616 N.W.2d 8 (2000).

[7] *State v. Bush*, 254 Neb. 260, 266, 576 N.W.2d 177, 180 (1998).

2011, decision. The district court, in granting O'Connor's motion for summary judgment, found that there was no evidence in the record that Harris had told O'Connor to appeal the Board's denial. Because we find that Harris has not produced evidence to show that O'Connor's actions constituted neglect or that Harris was harmed, the district court's grant of summary judgment was correct.

First, there is no genuine issue of material fact on the question of whether Harris directed O'Connor to appeal. In the days following the unsuccessful Board hearing, Harris and O'Connor met and then exchanged e-mails regarding how to proceed. There is no allegation or suggestion that during their face-to-face meeting, Harris told O'Connor to appeal.

More discussion on the topic was had via e-mail on February 9 and 10, 2011. We agree that these e-mails were confusing. But broadly understood, the e-mails suggest that Harris and O'Connor were in agreement that a rehearing before the Board should be sought and would likely show a genuine issue of material fact as to whether Harris told O'Connor to file for a rehearing. But Harris did not allege in his amended complaint that O'Connor committed malpractice by failing to expeditiously file for a new hearing with the Board. Rather, his amended complaint, as relevant here, alleged only that Harris told O'Connor to file an appeal, and O'Connor failed to do so. The e-mails simply do not show that Harris ever told O'Connor to appeal the Board's denial prior to terminating O'Connor's services on February 28.

Nor does the amended complaint clearly allege that Harris told O'Connor to appeal. Rather, Harris simply alleges that he "indicated to [O'Connor] that he was interested in pursuing an appeal." And in another place, he alleged that he "indicated that he was inclined to appeal."

And Harris cannot show that any negligence by O'Connor proximately caused harm to Harris. Section 22-91 of the City of Omaha's Police and Fire Retirement System pension ordinances provides in part that the Board "is hereby authorized and empowered and may open for rehearing any case where a former city employee has been denied an application for

a disability pension, which application had been previously heard . . . upon presentation of new evidence."[8]

The record establishes that Harris and O'Connor were anticipating new evidence to present to the Board, including "Al's report," as well as possibly "a report from either the [physical therapist] who gave you the FCE or Dr. [Alicia] Feldman." "Al's report" apparently was the key, as O'Connor writes: "Really can't do anything until we have Al's report." That report apparently refers to a "Loss of Earnings Capacity Evaluation" completed by Alfred Marchisio, Jr., dated March 11, 2011. Harris terminated O'Connor's employment on February 28.

Under § 22-91, Harris could have returned to the Board with that report and asked the Board to rehear his application. As such, any negligence on the part of O'Connor could not have been the proximate cause of the injury suffered by Harris because the record establishes that Harris suffered no injury, as Harris could have asked the Board for rehearing at any time he had new evidence to present. And the record in this case shows that Harris and O'Connor were, in fact, anticipating new evidence. Accordingly, summary judgment was appropriate.

The district court did not err in granting O'Connor's motion for summary judgment. Harris' first assignment of error is without merit.

2. Expert Testimony

In his second assignment of error, Harris assigns that the district court erred in finding that the issue of whether an attorney commits malpractice is a question of law and in refusing to allow expert testimony on the issue.

The expert testimony in question opined that O'Connor had failed to preserve for appellate review the record of Harris' petition before the Board. Whether an appellate record is appropriately preserved is a question of law. And expert testimony is generally not admissible concerning a question of law.[9]

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[8] Omaha Mun. Code, ch. 22, art. III, § 22-91 (2001).

[9] *Sports Courts of Omaha v. Brower*, 248 Neb. 272, 534 N.W.2d 317 (1995).

Even if expert testimony was admissible, Harris' expert was wrong—the law does allow municipal ordinances to be requested in the praecipe rather than introduced as exhibits at the hearing.[10]

The district court did not err in not admitting the evidence of Harris' expert. Harris' second assignment of error is without merit.

VI. CONCLUSION

The decision of the district court is affirmed.

AFFIRMED.

[10] See *State v. Bush*, *supra* note 7.

STATE OF NEBRASKA, APPELLEE, V. SCOTT D. JOHNSON, APPELLANT.

842 N.W.2d 63

Filed January 17, 2014. No. S-13-118.

1. **Probation and Parole.** The revocation of probation is a matter entrusted to the discretion of a trial court.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
3. **Constitutional Law: Due Process.** The determination of whether the procedures afforded an individual comport with the constitutional requirements for procedural due process presents a question of law.
4. **Appeal and Error.** An appellate court resolves questions of law independently of the lower court's conclusion.
5. **Moot Question.** A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the litigation's outcome.
6. **Moot Question: Jurisdiction: Appeal and Error.** Although mootness does not prevent appellate jurisdiction, it is a justiciability doctrine that can prevent courts from exercising jurisdiction.
7. **Moot Question: Appeal and Error.** Under the public interest exception to the mootness doctrine, an appellate court may review an otherwise moot case if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination.

8. ____: ____. When determining whether a case involves a matter of public interest, an appellate court considers (1) the public or private nature of the question presented, (2) the desirability of an authoritative adjudication for future guidance of public officials, and (3) the likelihood of future recurrence of the same or a similar problem.
9. **Probation and Parole: Due Process.** The minimum due process protections required at a probation revocation hearing are as follows: (1) written notice of the time and place of the hearing; (2) disclosure of evidence; (3) a neutral factfinding body or person, who should not be the officer directly involved in making recommendations; (4) opportunity to be heard in person and to present witnesses and documentary evidence; (5) the right to cross-examine adverse witnesses, unless the hearing officer determines that an informant would be subjected to risk of harm if his or her identity were disclosed or unless the officer otherwise specifically finds good cause for not allowing confrontation; and (6) a written statement by the fact finder as to the evidence relied on and the reasons for revoking the conditional liberty. In addition, the parolee or probationer has a right to the assistance of counsel in some circumstances where the parolee's or probationer's version of a disputed issue can fairly be represented only by a trained advocate.
10. **Probation and Parole: Proof.** While the revocation of probation is a matter entrusted to the discretion of a trial court, unless the probationer admits to a violation of a condition of probation, the State must prove the violation by clear and convincing evidence.
11. **Evidence: Words and Phrases.** Clear and convincing evidence means that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Shawn Elliott for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

In November 2007, Scott D. Johnson was convicted in the district court for Lancaster County of abuse of a vulnerable adult based on the financial exploitation of a relative. On

February 1, 2008, he was sentenced to 3 years' probation. On April 13, 2010, the State filed a motion to revoke Johnson's probation on the basis that Johnson had allegedly assaulted another individual, Martha Majocha. After a hearing, the district court found that the State had proved by clear and convincing evidence that Johnson had violated the terms and conditions of his probation by assaulting Majocha, and therefore, the district court revoked Johnson's probation and sentenced him to 1 to 2 years' imprisonment with 26 days' credit for time served. Johnson appeals the order revoking his probation. We affirm.

STATEMENT OF FACTS

In November 2007, Johnson was convicted of abuse of a vulnerable adult, a Class IIIA felony, and the district court sentenced Johnson to 3 years' probation on February 1, 2008. The conviction of abuse of a vulnerable adult was based on the financial exploitation of Johnson's step-great-grandmother. Johnson appealed the conviction and sentence, and the district court stayed the order of probation during the pendency of the appeal. The Nebraska Court of Appeals affirmed the conviction and sentence in a memorandum opinion filed on February 3, 2009, in case No. A-08-202. We denied Johnson's petition for further review. On April 20, the district court filed an "Order of Probation" reinstating Johnson's sentence of 3 years' probation.

On April 13, 2010, the State filed a motion to revoke Johnson's probation, alleging that he had failed "to refrain from unlawful or disorderly conduct or acts injurious to others." The basis for the motion to revoke probation was the alleged physical assault of Majocha by Johnson on March 18, 2010. Johnson was living with Majocha at the time of the alleged assault.

On January 28, 2011, Johnson filed a motion to discharge the motion to revoke probation on the bases that the matter was not given prompt consideration pursuant to Neb. Rev. Stat. § 29-2267 (Reissue 2008) and that his constitutional rights to a speedy trial and due process were violated. The district court denied Johnson's motion to discharge, finding that the matter

had been continued at Johnson's request and that Johnson had waived his right to a speedy "trial." Johnson appealed, and in case No. A-11-285, the Court of Appeals sustained the State's motion for summary dismissal on November 15, 2011, stating that an order denying a motion to discharge in probation revocation proceedings is not a final, appealable order. We denied Johnson's petition for further review.

After the mandate from the Court of Appeals was returned, the district court conducted an evidentiary hearing on the motion to revoke probation. The hearing was conducted over 2 days, on October 16 and November 21, 2012. It is the outcome of this probation revocation hearing which gives rise to the instant appeal.

At the probation revocation hearing, it was learned that Majocha had died on January 2, 2012, and thus she was not present at the hearing. On October 16, the State offered, over Johnson's objection, exhibit 20, which was a copy of an obituary for Majocha. The district court reserved its ruling on exhibit 20, and ultimately, it was not received into evidence. Nevertheless, on November 21, the district court stated that "the State [had] made a showing that . . . Majocha is dead" and that she was "simply unavailable to testify because of her death."

During the parties' opening statements at the hearing on October 16, 2012, the State argued that *State v. Clark*, 8 Neb. App. 525, 598 N.W.2d 765 (1999), and *State v. Shambley*, 281 Neb. 317, 795 N.W.2d 884 (2011), provide that the rules of evidence do not apply to a probation revocation proceeding. The district court then stated that

> the Court of Appeals and the Supreme Court have made it clear that ordinarily in a motion to revoke probation the defendant has a right to face and confront and cross-examine witnesses, unless the Court makes a finding of good cause as to why the defendant should not have the right to cross-examine and to face and confront witnesses against the defendant.

Both the State and Johnson agreed with the district court's characterization of the law.

Johnson further asserted that § 29-2267 provides that the probationer shall have the right to hear and "confront" the evidence against him. Section 29-2267 provides:

> Whenever a motion or information to revoke probation is filed, the probationer shall be entitled to a prompt consideration of such charge by the sentencing court. The court shall not revoke probation or increase the requirements imposed thereby on the probationer, except after a hearing upon proper notice where the violation of probation is established by clear and convincing evidence. The probationer shall have the right to receive, prior to the hearing, a copy of the information or written notice on the grounds on which the information is based. *The probationer shall have the right to hear and controvert the evidence against him,* to offer evidence in his defense and to be represented by counsel.

(Emphasis supplied.)

The State then called Officer Chris Schamber to testify. Officer Schamber testified that he had been on duty on March 18, 2010, and that on that day, he was called to the hospital to speak with Majocha regarding her injuries. Officer Schamber testified that at the hospital, he observed Majocha's injuries, specifically bruising on her breasts and shins. The State then questioned Officer Schamber regarding statements that Majocha had made. Johnson objected on the grounds that the statements were inadmissible hearsay and that because Majocha was not subject to cross-examination, admission of the statements would be a violation of Johnson's constitutional rights to due process and confrontation. The district court took Johnson's objection under advisement and continued the hearing to November 21, 2012.

The hearing resumed on November 21, 2012, and Officer Schamber resumed his testimony. He testified that he taped his interview with Majocha using a microcassette recorder. The State asked Officer Schamber to testify as to what Majocha told him during the interview. Johnson again objected based on hearsay and asserted that admission of the evidence would violate his constitutional rights to due process and confrontation. Johnson also argued that the State had not made a

showing of good cause as to why Johnson should be denied his right to confront and cross-examine, as is required by case law and § 29-2267.

The district court granted Johnson a continuing objection and allowed Officer Schamber to testify. Officer Schamber testified that Majocha said that she and Johnson lived together and that Johnson had caused her injuries over the course of approximately 3 months. Majocha stated that during those 3 months, Johnson would injure various parts of her body, including her shins and breasts. Majocha stated that Johnson had caused the injuries to her shins by kicking her while he was wearing a pair of cowboy boots. She further stated that Johnson had caused the injuries to her breasts by grabbing them and twisting them. Majocha also told Officer Schamber that she and Johnson were not sexually intimate, but that they did sleep in the same bed.

Officer Schamber testified that he took photographs of Majocha's injuries, and the court received the photographs into evidence over Johnson's objection. Officer Schamber then testified that after conducting the interview with Majocha, he arrested Johnson, giving rise to a separate criminal case not otherwise relevant to the instant case involving revocation of probation in the matter wherein his relative was the victim. Officer Schamber stated that Johnson admitted that he and Majocha lived together.

The State then called Sgt. Tracy Graham, who had met with Majocha at the hospital within days following the initial report by Officer Schamber. Sergeant Graham testified that she observed bruising on several parts of Majocha's body, including her breasts and shins. Sergeant Graham interviewed Majocha and made an audio and visual DVD recording of the interview. The State offered the DVD recording and a transcript of the recording into evidence, and Johnson objected. The district court reserved its ruling on the objection and granted Johnson a continuing objection. The district court stated that it would take the matter of the objection under advisement. Sergeant Graham was excused, and the State stated that it did not have any additional evidence. The district court then took a recess to consider Johnson's objections.

Following the recess, the district court overruled Johnson's objections. The district court stated that it found that the State showed good cause to allow the hearsay statements into evidence because Majocha was unavailable due to her death. The district court judge stated:

> The Court has reviewed the evidence and the relevant case law. I am going to make a finding consistent with [*State v. Clark*, 8 Neb. App. 525, 598 N.W.2d 765 (1999),] and [*State v. Shambley*, 281 Neb. 317, 795 N.W.2d 884 (2011)], and other relevant case law, that the State has made a showing that . . . Majocha is dead, and I am going to make a finding that, that constitutes good cause for denying [Johnson] the right of confrontation at this hearing. Obviously, she's simply unavailable to testify because of her death.
>
> I am, therefore, going to receive each of the exhibits . . . and consider her statements to Officer Schamber, as well as her statements to [Sergeant] Graham, and overrule [Johnson's] objections to the evidence.

The district court also stated that it found the hearsay statements to be "reliable and trustworthy" because they were corroborated by the photographs that were received into evidence depicting Majocha's injuries and by Johnson's statements to Officer Schamber that Johnson lived with Majocha. The defense rested without offering additional evidence at this time.

The district court then stated on the record that it found that the State had proved by clear and convincing evidence that Johnson had violated the terms and conditions of his probation. The court stated:

> The Court does find by clear and convincing evidence that [Johnson] did violate the terms and conditions of his probation as alleged in the Motion to Revoke Probation. As indicated previously . . . the rules of evidence do not apply in a revocation of probation proceeding, subject to case law regarding confrontation rights. And I previously made the finding consistent with [*State v. Clark, supra*,] and [*State v. Shambley, supra*], that the State has shown

> good cause why [Johnson] is denied his confrontation right, that is [Majocha] has died.
>
> Again, I find that the statements made by [Majocha] to Officer Schamber and [Sergeant] Graham are corroborated. They're corroborated by the photographs and they're corroborated by [Johnson's] statements that he did live with . . . Majocha, both at the address where he was arrested, and then at a previous address. The statements with [Majocha] are consistent with the injuries observed by the officers and as depicted in the photographs. I do find corroboration for those statements.
>
> I believe the statements are trustworthy and reliable, even if they are not — don't meet that legal standard, nevertheless, I find that [the] statements are corroborated. And I find that, based on the evidence presented, that the State has proven by clear and convincing evidence that [Johnson] did violate the terms and conditions of his probation as alleged in the Motion to Revoke Probation.

After the district court stated its findings, Johnson was given permission to withdraw his rest and offered an exhibit containing police reports regarding an alleged sexual assault that Majocha had reported to the police in October 2009 involving a different assailant. Johnson argued that the reports cast doubt on Majocha's credibility. The district court received the exhibit into evidence.

The district court then restated its finding that the State had proved by clear and convincing evidence that Johnson violated the terms and conditions of his probation, and the court set the matter for sentencing. On January 18, 2013, the district court filed an order that sentenced Johnson to 1 to 2 years' imprisonment with 26 days' credit for time served.

Johnson appeals.

ASSIGNMENTS OF ERROR

Johnson assigns, restated, that the district court erred when it (1) received into evidence hearsay statements of an unavailable witness at the hearing on the State's motion to revoke Johnson's probation, in violation of the rules of evidence and

constitutional rights to due process and confrontation, and (2) found that the State had proved by clear and convincing evidence that Johnson violated a term of probation.

STANDARDS OF REVIEW

[1,2] The revocation of probation is a matter entrusted to the discretion of a trial court. *State v. Schreiner*, 276 Neb. 393, 754 N.W.2d 742 (2008). A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *Id*. See, also, *State v. Ash*, 286 Neb. 681, 838 N.W.2d 273 (2013).

[3,4] The determination of whether the procedures afforded an individual comport with the constitutional requirements for procedural due process presents a question of law. *State v. Watson*, 285 Neb. 497, 827 N.W.2d 507 (2013). An appellate court resolves questions of law independently of the lower court's conclusion. See *State v. Leibel*, 286 Neb. 725, 838 N.W.2d 286 (2013).

ANALYSIS

The State sought to revoke Johnson's probation on the basis that he failed to refrain from unlawful or disorderly conduct or acts injurious to others, in violation of the terms of his probation. The incident upon which the revocation was proposed was Johnson's alleged assault of Majocha. After an evidentiary hearing, probation was revoked. Johnson claims that he was denied his right to due process and his right of confrontation under the Sixth Amendment and that the evidence was insufficient. We find no merit to his assignments of error.

[5-8] As an initial matter, we note that at oral argument, it was suggested that Johnson has been released from confinement and that as a result, this case has become moot. We have explained mootness and our ability to review a moot issue as follows:

> A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the litigation's outcome. Although mootness does not prevent appellate jurisdiction,

> it is a justiciability doctrine that can prevent courts from exercising jurisdiction.
>
> But under the public interest exception, we may review an otherwise moot case if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination. And when determining whether a case involves a matter of public interest, we consider (1) the public or private nature of the question presented, (2) the desirability of an authoritative adjudication for future guidance of public officials, and (3) the likelihood of future recurrence of the same or a similar problem.

Evertson v. City of Kimball, 278 Neb. 1, 7, 767 N.W.2d 751, 758 (2009) (citations omitted). See, also, *In re Interest of Thomas M.*, 282 Neb. 316, 803 N.W.2d 46 (2011).

This appeal presents valid reasons for applying the public interest exception. In certain of their appellate assertions, the parties refer to the Sixth Amendment right to confrontation, thus suggesting that the Sixth Amendment applies to probation revocation proceedings. Probation revocation proceedings are not criminal prosecutions, and although due process rights apply to probation revocation proceedings, the Sixth Amendment does not. We believe authoritative guidance is warranted on the issue of constitutional "confrontation" as that concept relates to probation revocation hearings. Accordingly, this case falls within the public interest exception, and we consider the appeal.

[9] Section 29-2267 provides in relevant part that during probation revocation proceedings, "the probationer shall have the right to hear and controvert the evidence against him, to offer evidence in his defense and to be represented by counsel." Relying on U.S. Supreme Court cases, we have described the minimum due process protections required at a probation revocation hearing as follows:

> (1) written notice of the time and place of the hearing; (2) disclosure of evidence; (3) a neutral factfinding body or person, who should not be the officer directly involved in making recommendations; (4) opportunity to be heard in person and to present witnesses and

> documentary evidence; (5) the right to cross-examine adverse witnesses, unless the hearing officer determines that an informant would be subjected to risk of harm if his or her identity were disclosed or unless the officer otherwise "'specifically finds good cause for not allowing confrontation'"; and (6) a written statement by the fact finder as to the evidence relied on and the reasons for revoking the conditional liberty. In addition, the parolee or probationer has a right to the assistance of counsel in some circumstances where the parolee's or probationer's version of a disputed issue can fairly be represented only by a trained advocate.

State v. Shambley, 281 Neb. 317, 327, 795 N.W.2d 884, 893 (2011) (citations omitted).

Under Neb. Rev. Stat. § 27-1101(4)(b) (Reissue 2008), the formal rules of evidence do not apply to a probation revocation hearing. Section 27-1101 states:

> (4) The [Nebraska Evidence] [R]ules, other than those with respect to privileges, do not apply in the following situations:
>
> . . . .
>
> (b) Proceedings for extradition or rendition; preliminary examinations or hearings in criminal cases; sentencing or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

In areas where the formal rules of evidence do not apply, we nevertheless take guidance from the rules. E.g., *In re Interest of Destiny A. et al.*, 274 Neb. 713, 742 N.W.2d 758 (2007) (stating that Nebraska Evidence Rules do not apply in cases involving termination of parental rights but serve as guidepost).

The foregoing framework applicable to a probation revocation proceeding requires due process, but it is settled law that a "[p]robation revocation . . . is not a stage of a criminal prosecution." *Gagnon v. Scarpelli*, 411 U.S. 778, 782, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973). We have recognized the foregoing principles in *Shambley, supra*. We have also noted in *Shambley* that in view of this framework, a probation revocation hearing should be "'flexible enough to consider evidence . . . that

would not be admissible in an adversary criminal trial.'" *Id*. at 327, 795 N.W.2d at 893 (quoting *Morrissy v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)).

Johnson claims that the district court erred when it received and considered the hearsay statements of Majocha as recited by Officer Schamber and Sergeant Graham and the associated DVD evidence. He refers us to the exceptions to the hearsay rule found in Neb. Rev. Stat. § 27-804 (Reissue 2008) and contends that although Majocha was unavailable, the statements were not reliable and thus not admissible under any exception to the rule excluding hearsay. He contends that he was denied his "right to confront and to cross-examine" Majocha. Brief for appellant at 20.

As noted, the formal rules of evidence do not apply to probation revocation hearings. § 27-1101(4)(b). But admission of evidence at a probation revocation hearing is not limitless. Our cases have previously considered a court's reliance on hearsay evidence in parole, probation, and similar hearings. E.g., *State v. Mosley*, 194 Neb. 740, 235 N.W.2d 402 (1975), *overruled on other grounds, State v. Kramer*, 231 Neb. 437, 436 N.W.2d 524 (1989); *State v. Clark*, 8 Neb. App. 525, 598 N.W.2d 765 (1999). We have observed that even though the evidentiary rules are relaxed, it is inadvisable for a court to rely solely on unsubstantiated hearsay. See *State v. Shambley, supra*. However, where, as in this case, the unavailability of a witness is shown and the court finds indicia of reliability and corroboration of the hearsay evidence through other evidence, good cause has been shown and the court may rely on the hearsay evidence in the absence of cross-examination. We believe the district court followed these established considerations in this case and did not err when it received and credited the hearsay statements of Majocha.

Johnson further argues that admission of Majocha's hearsay statements to the effect that Johnson assaulted her denied him his Sixth Amendment right to confrontation. The appellate arguments presented to us couched in the language of the Sixth Amendment guarantee of the right to confront witnesses inappropriately elevate the current probation revocation proceedings. Section 29-2267 affords a probationer a right to

"controvert" the evidence against him or her. Case law affords him or her due process as described above. But probation revocation proceedings are not criminal prosecutions, and the statutory right to controvert evidence is not the equivalent of the Sixth Amendment right to confront a witness.

Recent legal literature and case law are replete with discussion of the relevance of the Sixth Amendment's confrontation guarantee as it pertains to probation revocation proceedings. E.g., *Peters v. State*, 984 So. 2d 1227 (Fla. 2008) (cases collected); Esther K. Hong, *Friend or Foe? The Sixth Amendment Confrontation Clause in Post-Conviction Formal Revocation Proceedings*, 66 SMU L. Rev. 227 (2013). Much of the discussion is triggered by the case of *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), in which the U.S. Supreme Court generally held that an out-of-court testimonial statement of an unavailable declarant is not admissible at a criminal trial unless a defendant had a prior opportunity to cross-examine the declarant. If these requirements are not satisfied, the Sixth Amendment Confrontation Clause requires exclusion of the evidence. Since *Crawford* was decided, the majority of jurisdictions have held that *Crawford* concerns only Sixth Amendment confrontation rights in criminal prosecutions and that because parole or probation revocation proceedings are not criminal prosecutions, neither *Crawford* nor the Sixth Amendment Confrontation Clause applies to parole or probation revocation proceedings. See *Peters v. State*, *supra*.

We agree with the majority of courts which have concluded that the Sixth Amendment's confrontation guarantee does not apply to probation revocation proceedings. The "[c]ritical . . . distinction between a criminal prosecution at trial, during which a defendant enjoys the protections of the Sixth Amendment, and a [probation] revocation hearing is the fact that the accused at trial awaits a determination of guilt or innocence." *Peters v. State*, 984 So. 2d at 1231. The full range of constitutional rights available to an individual accused of a crime are not available in a probation revocation hearing. See, e.g., *Minnesota v. Murphy*, 465 U.S. 420, 104 S. Ct. 1136, 79 L. Ed. 2d 409 (1984) (reiterating that there is no right

to jury trial before probation is revoked). To the extent that Johnson claims he was denied a Sixth Amendment constitutional right of confrontation at his probation revocation hearing, we reject this assignment of error. It logically follows that a *Crawford* analysis is inapplicable to probation revocation evidentiary matters.

[10,11] Johnson also contends that the evidence was insufficient to revoke his probation. We reject this argument. While the revocation of probation is a matter entrusted to the discretion of a trial court, unless the probationer admits to a violation of a condition of probation, the State must prove the violation by clear and convincing evidence. *State v. Clark*, 8 Neb. App. 525, 598 N.W.2d 765 (1999). See, also, § 29-2267. Clear and convincing evidence means that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. *R & B Farms v. Cedar Valley Acres*, 281 Neb. 706, 798 N.W.2d 121 (2011). We have determined above that the statements of Majocha to the effect that Johnson assaulted her were admissible. We need not repeat the other graphic evidence here. The district court determined that the evidence clearly and convincingly shows that Johnson acted in a manner that violated the terms of his probation in that, at a minimum, he failed to refrain from acts injurious to others. We find no error in this determination.

CONCLUSION

By application of the public interest exception to the mootness doctrine, this case presents an opportunity to consider the relationship of the Sixth Amendment confrontation guarantee and *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), as they relate to probation revocation proceedings. Because probation revocation proceedings are not criminal prosecutions, these rights do not apply, but the probationer is entitled to due process and an opportunity to controvert the evidence against him or her. The district court did not err when it revoked Johnson's probation. Accordingly, we affirm.

AFFIRMED.

CASSEL, J., not participating.

TONY UNDERWOOD, APPELLANT, V. NEBRASKA STATE PATROL, APPELLEE.

842 N.W.2d 57

Filed January 17, 2014. No. S-13-207.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
3. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
5. **Statutes: Legislature: Intent: Appeal and Error.** In discerning the meaning of a statute, an appellate court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
6. **Criminal Law: Weapons: Licenses and Permits: Criminal Attempt.** The obvious purpose of Neb. Rev. Stat. § 69-2433 (Cum. Supp. 2012) is to prevent people with a demonstrated propensity to commit crimes, including crimes involving acts of violence, from carrying concealed weapons so as to minimize the risk of future gun violence. An attempt to commit a crime is indicative of future behavior, and in the context of § 69-2433(5), the attempt itself is an act of violence.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Affirmed.

Lawrence G. Whelan and Dennis Whelan, of Whelan Law Office, for appellant.

Jon Bruning, Attorney General, and Jody R. Gittins for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

Tony Underwood appeals the order of the district court for Douglas County in which it affirmed the decision of the Nebraska State Patrol (State Patrol) denying Underwood's application for a permit to carry a concealed handgun. The Concealed Handgun Permit Act (the Act) is found at Neb. Rev. Stat. § 69-2427 et seq. (Reissue 2009 & Cum. Supp. 2012). Under § 69-2433(5) of the Act, a permit will be denied an applicant who has "been convicted of a misdemeanor crime of violence under the laws of this state . . . within the ten years immediately preceding the date of application." In 2008, Underwood was convicted at a jury trial of attempted third degree sexual assault of a child, a Class I misdemeanor. Underwood applied for a concealed handgun permit in December 2011. Underwood claims that attempted third degree sexual assault of a child was not a "crime of violence" under § 69-2433(5) and that the State Patrol and the district court erred when they concluded that Underwood's application should be denied. We find no errors on the record, and affirm.

STATEMENT OF FACTS

In December 2011, Underwood filed an application for a concealed handgun permit with the State Patrol. On the application, he answered "No" to the question, "Have you ever plead [sic] guilty or no contender [sic] or been convicted of a felony or crime of violence in any jurisdiction." On January 19, 2012, the State Patrol sent Underwood a letter stating that his application had been denied for the reason that he had been convicted of a crime of violence, specifically "attempted sexual assault."

Underwood petitioned for an administrative hearing to contest the decision denying his application. The hearing was held on June 6, 2012. Evidence admitted at the hearing showed that Underwood had been charged in 2006 with third degree sexual assault of a child, in violation of Neb. Rev. Stat. § 28-320.01 (Reissue 2008). Section 28-320.01(1)

provides that "[a] person commits sexual assault of a child in the second or third degree if he or she subjects another person fourteen years of age or younger to sexual contact and the actor is at least nineteen years of age or older," and § 28-320.01(3) provides that "[s]exual assault of a child is in the third degree if the actor does not cause serious personal injury to the victim."

Sheriff's reports admitted into evidence at the administrative hearing showed that a girl who was 12 years old at the time of the incident alleged that Underwood, who was then 32 years old, had walked into a room where she was sleeping, put his hand under her shirt, and ran his hand up toward her chest, where he rubbed her; the girl said that he might have touched her breast, but she was not sure. Underwood went to trial in 2008, and a jury found him guilty of attempted third degree sexual assault of a child. Reading § 28-320.01(3) and Neb. Rev. Stat. § 28-201(4)(e) (Reissue 2008) together, the conviction was a Class I misdemeanor. Under § 28-320.01(3), third degree sexual assault of a child is a Class IIIA felony for the first offense, and under § 28-201(4)(e), a criminal attempt is a Class I misdemeanor when the crime attempted is a Class IIIA or Class IV felony.

Following the administrative hearing, the hearing officer recommended affirming the denial of Underwood's application. The hearing officer noted in his findings of fact and conclusions of law that at the time Underwood filed his application, the Act provided that an applicant for a permit shall "[n]ot have pled guilty to, not have pled nolo contendere to, or not have been convicted of a misdemeanor crime of violence under the laws of this state or under the laws of any other jurisdiction within the ten years immediately preceding the date of application." See § 69-2433(5) (Cum. Supp. 2010). The hearing officer further noted that the statute had been amended effective April 19, 2012, to provide that an applicant shall "[n]ot have been convicted of a misdemeanor crime of violence under the laws of this state or under the laws of any other jurisdiction within the ten years immediately preceding the date of application." See § 69-2433(5) (Cum. Supp. 2012). The hearing officer determined that the amendment did not

affect the outcome of this matter, an assessment with which neither Underwood nor this court disagrees.

In determining whether Underwood had committed a "crime of violence," the hearing officer did not consider the sheriff's report which contained the victim's allegations but instead considered the elements of the crime of which Underwood was convicted. The hearing officer noted that the term "crime of violence" was not defined in the Act. The hearing officer looked to case law, including *State v. Palmer*, 224 Neb. 282, 294, 399 N.W.2d 706, 717 (1986), in which this court stated that a crime of violence is "an act which injures or abuses through the use of physical force." With this understanding of the phrase "crime of violence," the hearing officer determined that third degree sexual assault of a child was a "crime of violence" and further determined that for purposes of § 69-2433(5), an attempt to commit a crime of violence is itself a crime of violence. The hearing officer stated that the Act was "concerned with the future behavior of a holder of a permit" and that "§ 69-2433 specifies past crimes, circumstances and behaviors deemed relevant to future behavior." The hearing officer reasoned that "[o]ne who attempts to commit a crime of violence has manifested the past behavior which is" relevant to future behavior.

The hearing officer determined that because Underwood had been convicted of attempted third degree sexual assault of a child in 2008, Underwood had been convicted of a misdemeanor crime of violence within the 10 years immediately preceding the date of his application in 2011, and that therefore the State "was justified in denying the application under § 69-2433(5)." On June 20, 2012, the State Patrol agency head adopted the hearing officer's recommendation and denied Underwood's application.

Underwood petitioned the district court for review of the State Patrol's decision under the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 2008 & Cum. Supp. 2012). A hearing was conducted on December 3, 2012. On March 1, 2013, the court filed an order in which it affirmed the State Patrol's denial of Underwood's application. The court stated in its order that the Act "is designated [sic]

by the legislature to restrict the ability to carry a concealed weapon to those persons not believed to be threatening to society." The court agreed with the hearing officer's reasoning that "an individual who attempts to commit a crime of violence is one who has manifested in their past behavior the inability to carry a concealed weapon and obtain such permit." The court determined that Underwood's conviction for attempted third degree sexual assault of a child disqualified him from obtaining a concealed handgun permit under § 69-2433(5) of the Act.

Underwood appeals the district court's order which affirmed the denial of his application for a concealed handgun permit by the State Patrol.

ASSIGNMENT OF ERROR

Underwood claims that the district court erred when it concluded that attempted third degree sexual assault of a child is a "crime of violence" under § 69-2433(5) and affirmed the denial of his application for a concealed handgun permit.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Skaggs v. Nebraska State Patrol*, 282 Neb. 154, 804 N.W.2d 611 (2011).

[2-4] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *J.P. v. Millard Public Schools*, 285 Neb. 890, 830 N.W.2d 453 (2013). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.* Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *Skaggs v. Nebraska State Patrol*, *supra*.

ANALYSIS

Section 69-2433 of the Act describes the characteristics an applicant must possess to receive a permit, as well as facts which disqualify an applicant. Section 69-2433(5) at issue in this case provides that an applicant shall "[n]ot have been convicted of a misdemeanor crime of violence under the laws of this state or under the laws of any other jurisdiction within the ten years immediately preceding the date of application." Other statutory disqualifying facts include § 69-2433(2) (prohibited under "18 U.S.C. 922"), § 69-2433(4) (convicted of felony), and § 69-2433(8) (convicted of any law relating to firearms, unlawful use of weapon, or controlled substances).

Underwood concedes that by its terms, a conviction of third degree sexual assault of a child under § 28-320.01 is a crime of violence for purposes of § 69-2433(5) and therefore would disqualify an individual from receiving a concealed handgun permit. We agree. See, also, *State v. Nelson*, 235 Neb. 15, 453 N.W.2d 454 (1990) (referring to statutory sexual assault as crime of violence). Underwood contends, however, that an attempt to commit third degree sexual assault of a child is not a crime of violence under § 69-2433(5). Underwood asserts that the district court erred when it found to the contrary and affirmed the denial of his application for a concealed handgun permit. We reject Underwood's argument.

As an initial matter, we observe that there is nothing in the plain language of § 69-2433 which invites us to examine the particular facts underlying the disqualifying convictions to which reference is made, and we decline to do so. It is the fact of conviction which gives rise to the disqualification, not the factual details of the crime. Accordingly, we look to the elements of the statutes underlying the conviction in this case to determine whether Underwood's misdemeanor conviction for attempted third degree sexual assault of a child was for a crime of violence for purposes of § 69-2433(5).

We briefly recite or paraphrase the relevant criminal statutes. A person commits sexual assault of a child in the third degree if he or she subjects another person 14 years of age or younger to sexual contact and the actor is at least 19 years of age or older. § 28-320.01(1). Sexual assault of a child is in

the third degree if the actor does not cause serious personal injury to the victim. § 28-320.01(3). "Sexual contact" means the intentional touching of a victim's sexual or intimate parts and shall include only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification. See Neb. Rev. Stat. § 28-318(5) (Cum. Supp. 2012). A person is guilty of an attempt to commit a crime if one intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he or she believes them to be or which, under the circumstances as he or she believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his or her commission of the crime. § 28-201(1).

The expression "crime of violence" in § 69-2433(5) is not defined. Underwood suggests we apply criminal case law to determine the meaning of the expression "crime of violence" as used in § 69-2433(5). Under this approach and relying on criminal cases such as *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986), Underwood contends that "physical force" is required for a crime of violence and that the absence of physical force in the attempted crime at issue precludes a finding of a crime of violence under § 69-2433(5). Underwood's reasoning is flawed.

[5] At issue in this case is the meaning of "crime of violence" as used in § 69-2433(5). Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Skaggs v. Nebraska State Patrol*, 282 Neb. 154, 804 N.W.2d 611 (2011). This statute is found in chapter 69 ("Personal Property"), article 24 ("Guns"), of the Nebraska Revised Statutes. The provisions of § 69-2433 dealing with concealed handgun permits constitute a civil statute. Application of the intricacies of criminal law jurisprudence on which Underwood heavily relies is not well suited to implementation of this civil permit statute. Instead, to determine the meaning of "crime of violence" in § 69-2433(5), we should look, as the State Patrol and district court did, to the conventional rule of statutory construction that in discerning the meaning of a statute, we must determine and give effect to

the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *Watkins v. Watkins*, 285 Neb. 693, 829 N.W.2d 643 (2013).

The hearing officer concluded that the Act

> is concerned with the future behavior of a holder of a [gun] permit. § 69-2433 specifies past crimes, circumstances and behaviors deemed relevant to future behavior. One who attempts to commit a crime of violence has manifested the past behavior which is the focus of the act rather than the, at times, fortuitous outcome or success of that behavior.

We agree with the foregoing observation, as did the district court.

[6] Section 69-2433 lists numerous convictions which serve to disqualify an applicant from receiving a concealed handgun permit. The obvious purpose of § 69-2433 is to prevent people with a demonstrated propensity to commit crimes, including crimes involving acts of violence, from carrying concealed weapons so as to minimize the risk of future gun violence. Regardless of which definition of attempt is applied, Underwood stands convicted of having attempted to commit third degree sexual assault of a child. An attempt to commit a crime is indicative of future behavior, and in the context of § 69-2433(5), we believe the attempt itself is an act of violence. Thus, Underwood has "been convicted of a misdemeanor crime of violence" under § 69-2433(5), as the district court so determined.

CONCLUSION

The district court affirmed the State Patrol's decision that Underwood's conviction of attempted third degree sexual assault of a child was a crime of violence under § 69-2433(5) and disqualified him from receiving a concealed handgun permit. Finding no error, we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMEY R. GREEN, APPELLANT.

842 N.W.2d 74

Filed January 17, 2014. No. S-13-222.

1. **Constitutional Law: Statutes: Appeal and Error.** The constitutionality of a statute is a question of law, regarding which the Supreme Court is obligated to reach a conclusion independent of the determination reached by the trial court.
2. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
3. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
4. **Motions for Mistrial: Appeal and Error.** Whether to grant a motion for mistrial is within the trial court's discretion, and an appellate court will not disturb its ruling unless the court abused its discretion.
5. **Constitutional Law: Statutes.** In a challenge to the overbreadth and vagueness of a law, a court's first task is to analyze overbreadth.
6. ____: ____. An attack on the overbreadth of a statute asserts that language in the statute impermissibly infringes on a constitutionally protected right.
7. ____: ____. A statute may be unconstitutionally overbroad only if its overbreadth is substantial, that is, when the statute would be unconstitutional in a substantial portion of the situations to which it is applicable.
8. **Constitutional Law: Criminal Law: Statutes.** The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.
9. **Constitutional Law: Statutes: Legislature: Notice.** The more important aspect of the void-for-vagueness doctrine is not actual notice, but the requirement that a legislature establish minimal guidelines to govern law enforcement.
10. **Constitutional Law: Statutes: Standing.** To have standing to assert a claim of vagueness, a defendant must not have engaged in conduct which is clearly prohibited by the questioned statute and cannot maintain that the statute is vague when applied to the conduct of others.
11. ____: ____: ____. A court will not examine the vagueness of the law as it might apply to the conduct of persons not before the court.
12. ____: ____: ____. The test for standing to assert a vagueness challenge is the same whether the challenge asserted is facial or as applied.
13. **Appeal and Error.** In order to be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
14. **Constitutional Law: Search and Seizure.** The Fourth Amendment to the U.S. Constitution protects against unreasonable searches and seizures.

15. **Constitutional Law: Warrantless Searches: Search and Seizure.** Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions, which must be strictly confined by their justifications.
16. **Warrantless Searches: Search and Seizure: Probation and Parole.** The U.S. Supreme Court has recognized that there is an exception to the warrant requirement for searches and seizures when special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirements impracticable. A probation setting is an example of such a special need.
17. **Constitutional Law: Warrantless Searches: Probation and Parole.** Conditions in probation orders requiring the probationer to submit to warrantless searches, to the extent they contribute to the rehabilitation process and are done in a reasonable manner, are valid and constitutional.
18. **Search and Seizure: Probation and Parole: Police Officers and Sheriffs.** Law enforcement may conduct probation searches of probationers so long as law enforcement is acting under the direction of a probation officer.
19. **Entrapment: Jury Instructions.** When a defendant raises the defense of entrapment, the trial court must determine, as a matter of law, whether the defendant has presented sufficient evidence to warrant a jury instruction on entrapment.
20. **Constitutional Law: Criminal Law: Entrapment: Words and Phrases.** The entrapment defense is not of constitutional dimension. In Nebraska, entrapment is an affirmative defense consisting of two elements: (1) the government induced the defendant to commit the offense charged and (2) the defendant's predisposition to commit the criminal act was such that the defendant was not otherwise ready and willing to commit the offense.
21. **Entrapment: Evidence: Proof.** The burden of going forward with evidence of government inducement is on the defendant. In assessing whether the defendant has satisfied this burden, the initial duty of the court is to determine whether there is sufficient evidence that the government has induced the defendant to commit a crime. The court makes this determination as a matter of law, and the defendant's evidence of inducement need be only more than a scintilla to satisfy his or her initial burden.
22. **Criminal Law: Entrapment: Estoppel.** The defense of entrapment by estoppel consists of four elements: (1) the defendant acted in good faith before taking any action; (2) an authorized government official, acting with actual or apparent authority and who had been made aware of all relevant historical facts, affirmatively told the defendant that his or her conduct was legal; (3) the defendant actually relied on the statements of the government official; and (4) such reliance was reasonable.
23. **Entrapment: Estoppel: Proof.** The same burdens apply for the defense of entrapment by estoppel as do for traditional estoppel.
24. **Entrapment: Intent.** Nebraska has adopted the "origin of intent" test for entrapment: If the intent to commit the crime charged originated with the government rather than the defendant, the defendant was entrapped.
25. **Trial: Prosecuting Attorneys.** Generally, in assessing allegations of prosecutorial misconduct in closing arguments, a court first determines whether the

prosecutor's remarks were improper. It is then necessary to determine the extent to which the improper remarks had a prejudicial effect on the defendant's right to a fair trial.

26. **Motions for Mistrial: Prosecuting Attorneys: Proof.** Before it is necessary to grant a mistrial for prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred.
27. **Criminal Law: Motions for Mistrial: Appeal and Error.** A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial.
28. **Criminal Law: Trial: Prosecuting Attorneys: Juries.** It is highly improper and generally prejudicial for a prosecuting attorney in a criminal case to declare to the jury his or her personal belief in the guilt of the defendant, unless such belief is given as a deduction from evidence.
29. **Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.
30. **Plea in Abatement: Appeal and Error.** Any error in ruling on a plea in abatement is cured by a subsequent finding at trial of guilt beyond a reasonable doubt which is supported by sufficient evidence.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Christopher Eickholt for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

HEAVICAN, C.J.

I. INTRODUCTION

Jamey R. Green was convicted of possession of a deadly weapon by a prohibited person and was sentenced to 2 years' probation. He appeals. We affirm.

II. BACKGROUND

Green was convicted in 2007 of several felonies in Minnesota for which he was serving probation. Green and the State of

Minnesota applied with the State of Nebraska for a courtesy supervision of Green's probation. An investigation was conducted by Karen Foster, a probation officer for the State of Nebraska. That investigation included, among other things, an August 29, 2011, visit by Foster to the home of Green's sister, where Green was planning to reside if the transfer was approved. Following that investigation, Green's transfer request was granted.

On September 21, 2011, Green signed paperwork agreeing to probation supervision by the State of Nebraska. At the time Green signed this paperwork, he met with Leslie Van Winkle, another probation officer. The courtesy supervision guidelines agreed to by Green stated that he "[s]hall not be in possession of any firearms or illegal weapons" and that he "[s]hall submit to a search and seizure of premises, person, or vehicle by a law enforcement officer or probation officer, with or without a warrant, day or night, to determine the presence of alcoholic beverages or controlled substances." In addition, the transfer application submitted by Green provided that both Green and the Nebraska Office of Probation were bound by the conditions of probation as set forth in the Minnesota order of probation. Among other requirements, the Minnesota order of probation provided that Green "shall submit to random searches of his person, vehicle and residence."

About a month later, Green was assigned a new probation officer, Kristi Bender. Bender had previously been on maternity leave, and Van Winkle had been helping with Bender's caseload during her absence. On October 20, 2011, Bender met with Green at the probation office. In the month that followed that meeting, Bender spoke with Green on the telephone on at least one occasion.

On November 14, 2011, Bender and Foster conducted a surprise home visit at Green's home. While on the visit, Bender asked to view Green's bedroom. Upon being shown the room, Bender and Foster noted a sword and knife collection lining the walls of the bedroom. After returning to the office, Bender spoke with a colleague who had law enforcement experience to discuss whether Green was permitted to have the swords

and knives. Based upon that conversation, Bender thought that Green might have violated the law in possessing the swords and knives, so she contacted the Lincoln Police Department. The next day, after considering the matter and consulting with others at the police department, Joshua Zarasvand, the officer assigned to Bender's call, determined that officers needed to examine the collection to determine whether it was legal for Green to possess it.

Zarasvand, along with several other uniformed officers, met Bender at a location near Green's home. Zarasvand reviewed a copy of Green's probation contract that was provided by Bender. At that point, the group approached the front door of the home. As part of the group was knocking on the front door, Officer Dawn Moore noticed that the garage door was opening. Moore and another officer approached the garage and found Green and his mother.

Bender, Zarasvand, and Officer Steven Wiese then joined Moore in the garage, and Bender informed Green that she needed to conduct a search of his residence. Green, Bender, Zarasvand, Moore, and Wiese then entered the home by the side door and went directly to the basement.

Upon entering the basement, Bender testified that the sword and knife collection was still set up as it had been the day before. Zarasvand, Moore, and Wiese all testified to the presence of the sword and knife collection. Zarasvand then asked Green if the swords and knives belonged to him; Green replied that they did. Zarasvand then placed Green under arrest. It was later determined that Green's collection consisted of 46 various swords and knives of differing quality, blade sharpness, and blade length.

Green was charged in Lancaster County Court with violation of Neb. Rev. Stat. § 28-1206 (Cum. Supp. 2012), possession of a deadly weapon by a prohibited person, a Class III felony. Following a preliminary hearing, the charge was bound over to the district court and an information was filed on March 16, 2012.

On March 21, 2012, Green filed a plea in abatement alleging that there was insufficient evidence adduced at the preliminary

hearing to bind the case over to district court. The plea in abatement was overruled on April 23.

On April 25, 2012, Green filed a motion to quash on the ground that § 28-1206 and related statutes were unconstitutionally vague and overbroad. The motion to quash was overruled on May 22. Green pled not guilty on June 6.

On August 15, 2012, Green filed motions to suppress the searches of his residence on November 14 and 15, 2011, along with all items observed in or seized from his residence and any statements made by him during his contact with law enforcement during the search and arrest on November 15. His motions were overruled.

Trial was then held on December 10 and 11, 2012. Testimony was given in accordance with the facts as stated above, including a stipulation that Green was a convicted felon and testimony that various knives from the collection had blades in excess of 3½ inches in length. In addition, Green testified in his own behalf that he disclosed his sword and knife collection on paperwork he had completed with probation in the presence of Van Winkle, but acknowledged that he did not verbally inform her of the collection.

Green's sister also testified. In her testimony, she stated that the sword and knife collection was in place at the time that Foster conducted her initial home visit and that she discussed the collection with Foster insofar as she "asked her if [the collection] would be okay." Green's sister testified that Foster told her that "she didn't see that [the collection] would be a problem." Green's sister did not testify that she relayed this information to Green.

In addition, a frequent visitor to Green's home testified that she was in the house in May 2011, prior to Green's arrival from Minnesota, and that the swords and knives were in place at that time.

At the jury instruction conference, Green requested that the jury be instructed on the defense of entrapment. The district court refused the instruction. Closing arguments were then held. During the State's closing, the prosecutor stated the following:

> Typically at this stage, I would tell you there are [sic] one issue, maybe two that you have to decide, that we're only fighting about one or two things. But in this case I don't know what we're fighting about.
>
> The defendant admitted to you, under oath, every single element of the crime that I have to prove in order for you to find him guilty. . . . Green said that on the 14th and 15th of November of 2011, he possessed a knife. He's admitted and stipulated that before that time he had been convicted of a felony, and that this all occurred here in Lancaster County, Nebraska. That's it. That's what I have to prove to you and that's what you have to find in order to find him guilty. So I'm a little confused on why we're here and what's the issue.

At this point, Green objected and moved for a mistrial, arguing that "the prosecutor is arguing his personal opinion with respect to the evidence in this case. He's commenting on the fact that we're here in trial and he's confused as to why we're having a trial." The district court overruled the motion for mistrial, but instructed the jury that "it is improper for attorneys to give their own personal opinions about the evidence and if [the prosecutor] has done so, you are ordered to disregard his personal opinions."

Following closing arguments and jury instructions, the jury retired to deliberate. About 90 minutes later, the jury returned with a guilty verdict. Green was subsequently sentenced to 2 years' probation. He appeals.

III. ASSIGNMENTS OF ERROR

On appeal, Green assigns, restated and consolidated, that the district court erred in (1) denying his motion to quash, (2) denying his motions to suppress, (3) failing to instruct the jury on entrapment, (4) denying his motion for mistrial, (5) finding sufficient evidence to support his guilty verdict, and (6) denying his plea in abatement.

IV. STANDARD OF REVIEW

[1] The constitutionality of a statute is a question of law, regarding which the Supreme Court is obligated to reach a

conclusion independent of the determination reached by the trial court.[1]

[2] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.[2]

[3] Whether jury instructions given by a trial court are correct is a question of law.[3]

[4] Whether to grant a motion for mistrial is within the trial court's discretion, and an appellate court will not disturb its ruling unless the court abused its discretion.[4]

V. ANALYSIS

1. Motion to Quash

In his first assignment of error, Green asserts that the district court erred in denying his motion to quash. Green argues that the felon in possession statute under which he was charged, § 28-1206, and its definitional section, Neb. Rev. Stat. § 28-1201 (Cum. Supp. 2012), are unconstitutionally vague and overbroad.

Section 28-1206(1) provides in relevant part that "[a]ny person who possesses a firearm, a knife, or brass or iron knuckles and who has previously been convicted of a felony . . . commits the offense of possession of a deadly weapon by a prohibited person." Section 28-1201(5) defines knife as "any dagger, dirk, knife, or stiletto with a blade over three and one-half inches in length or any other dangerous instrument capable of inflicting cutting, stabbing, or tearing wounds."

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[1] *State v. Prescott*, 280 Neb. 96, 784 N.W.2d 873 (2010).

[2] *State v. Wiedeman*, 286 Neb. 193, 835 N.W.2d 698 (2013).

[3] *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013).

[4] *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

[5] As a general rule, in a challenge to the overbreadth and vagueness of a law, a court's first task is to analyze overbreadth.[5]

(a) Overbreadth

[6,7] An attack on the overbreadth of a statute asserts that language in the statute impermissibly infringes on a constitutionally protected right.[6] A statute may be unconstitutionally overbroad only if its overbreadth is substantial, that is, when the statute would be unconstitutional in a substantial portion of the situations to which it is applicable.[7]

Green argues that the statute is overbroad in that it "necessarily prohibits every item with a blade exceeding three and one-half inches" and "would seem to prohibit every sharp object a person might have in his or her possession."[8]

But Green overlooks the fact that the definition of "knife" set forth in § 28-1201(5) does not prohibit the innocent possession of a knife with a blade in excess of 3½ inches. Rather, the possession of such a knife is only a violation of the law when the possessor, like Green, is a felon. Thus, the definition of a knife acts together with the criminal liability set forth in § 28-1206(1) to prohibit the possession of a knife in a fairly narrow set of circumstances—when that knife is possessed by a felon. This does not infringe upon a substantial amount of constitutionally protected conduct, but instead acts to deter convicted felons from possessing dangerous weapons.[9]

Green's argument that the statutes are overbroad is without merit.

(b) Vagueness

[8,9] The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is

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[5] *State v. Faber*, 264 Neb. 198, 647 N.W.2d 67 (2002).

[6] *Id.*

[7] *Id.*

[8] Brief for appellant at 29.

[9] See *State v. Jones*, 198 N.J. Super. 553, 487 A.2d 1278 (1985).

prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.[10] The more important aspect of the void-for-vagueness doctrine is not actual notice, but the requirement that a legislature establish minimal guidelines to govern law enforcement.[11]

[10-12] To have standing to assert a claim of vagueness, a defendant must not have engaged in conduct which is clearly prohibited by the questioned statute and cannot maintain that the statute is vague when applied to the conduct of others.[12] A court will not examine the vagueness of the law as it might apply to the conduct of persons not before the court.[13] The test for standing to assert a vagueness challenge is the same whether the challenge asserted is facial or as applied.[14]

Green lacks standing to assert that § 28-1206 is vague because his conduct clearly violated the statute. The statute prohibits the possession of a knife by a felon. And "[k]nife" is defined in § 28-1201(5) to include a knife with a blade that exceeds 3½ inches in length. Green was undisputedly a felon; the evidence presented at trial showed, Green admitted, and a jury found, that Green was in possession of knives with blades in excess of 3½ inches as defined by the statute.

Green lacks standing, and therefore his argument that the statutes are vague is without merit, as is his first assignment of error.

2. Motions to Suppress

In his second assignment of error, Green assigns that the district court erred in denying his motions to suppress and in admitting the sword and knife collection and statements he made to law enforcement at the time of the search.

[13] While Green assigns that his statements admitting that the weapons were his should have been suppressed and he restates that assignment in the facts section of his brief, he

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[10] *State v. Faber, supra* note 5.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

does not otherwise argue the inadmissibility of those statements. As such, the admissibility of the statements will not be discussed further. In order to be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.[15]

Green does not contest the validity of Bender and Foster's first entry into his home on November 14, 2011, and acknowledges that once the officers were in his bedroom on November 15, the sword and knife collection was in plain view. But Green contends the November 15 search was not done pursuant to a warrant, does not fit within an exception to the warrant requirement, and was not permitted by any condition of his probation; as such, the fruits of that search—the sword and knife collection—should be suppressed.

[14-17] The Fourth Amendment to the U.S. Constitution protects against unreasonable searches and seizures. We have stated that warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions, which must be strictly confined by their justifications.[16] The U.S. Supreme Court has recognized that there is an exception to the warrant requirement for searches and seizures "when 'special needs,' beyond the normal need for law enforcement, make the warrant and probable-cause requirements impracticable."[17] A probation setting is an example of such a special need.[18] Moreover, this court has held that "conditions in probation orders requiring the probationer to submit to warrantless searches, to the extent they contribute to the rehabilitation process and are done in a reasonable manner, are valid and constitutional."[19]

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[15] *J.P. v. Millard Public Schools*, 285 Neb. 890, 830 N.W.2d 453 (2013).

[16] *State v. Borst*, 281 Neb. 217, 795 N.W.2d 262 (2011).

[17] *Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987).

[18] *Id.*

[19] *State v. Morgan*, 206 Neb. 818, 826-27, 295 N.W.2d 285, 289 (1980).

In this case, Green's Nebraska probation order allowed for searches for drugs or alcohol at any time. Of course, the search at issue was not done for the purposes of searching for drugs and alcohol. Rather, the record is clear that probation and law enforcement were interested in examining the sword and knife collection. But Green's Minnesota probation order included a broader search condition. Green argues that the Nebraska order narrowed the terms of his probation, but he provides no authority for his implicit assertion that the Minnesota condition on searches was no longer applicable. Indeed, the Nebraska order, which Green specifically agreed to, provided that all terms of the Minnesota order must continue to be complied with. Thus, Green's contention that the conditions of his probation did not permit this search is without merit.

And the search condition is reasonable and related to the rehabilitative process. While no warrant was sought, there was probable cause to obtain a warrant based upon Bender and Foster's viewing the sword and knife collection. In addition, the search was done during daylight hours, and the police located Green before conducting the search and were admitted into the home by Green. Given this context and the presence of probable cause, the search of Green's bedroom was reasonable.

Green also argues that the search condition was not related to the rehabilitative purposes of his probation because he was not convicted of a weapons violation. But state law prohibits all felons, regardless of the underlying felony, from possessing a weapon,[20] and Green's probation order specifically noted that he was not to possess illegal weapons. The search condition is related to this prohibition.[21] Green's argument that there is no definition of an illegal weapon is without merit, as state law specifically sets forth the weapons which may not be possessed by a convicted felon.[22]

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[20] § 28-1206.

[21] See, e.g., *State v. Davis*, 6 Neb. App. 790, 577 N.W.2d 763 (1998).

[22] §§ 28-1201 and 28-1206.

Finally, Green argues that the search was illegal because it was done by law enforcement "for the purpose of locating and confiscating the alleged knives and swords in . . . Green's residence."[23] Green contends that the search "cannot be said to be a probation search [because t]he matter was turned over to law enforcement, whose members organized the search."[24]

[18] We disagree that on these facts the search was not a probation search. Law enforcement may conduct searches of probationers so long as law enforcement is acting under the direction of a probation officer.[25] The Eighth Circuit has noted that

> [p]robation offices are neither designed nor staffed to conduct these types of searches alone. . . . Probation officers often must bring law enforcement along to ensure the probation officers' safety. . . . In short, when a probationary condition authorizes searches by probation officers, the Fourth Amendment does not require probation officers to choose between endangering themselves by searching alone and foregoing [sic] the search because they lacked the resources and expertise necessary to search alone safely.[26]

Such was the case here. It was a probation officer, Bender, who originally expressed concern about the collection, and both Bender and Foster testified that because of safety concerns, nothing was said to Green about the collection during the home visit. Because of the probation office's questions about the legality of the collection, Bender ultimately contacted law enforcement. Finally, Bender and her supervisor were present during the search. Under these circumstances, we conclude that the search of Green's bedroom was done under the direction of probation.

This result does not change because Green was ultimately charged with being a felon in possession of a weapon rather

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[23] Brief for appellant at 36.

[24] *Id.* at 34.

[25] See, e.g., *U.S. v. Warren*, 566 F.3d 1211 (10th Cir. 2009); *U.S. v. Newton*, 369 F.3d 659 (2d Cir. 2004); *U.S. v. Brown*, 346 F.3d 808 (8th Cir. 2003).

[26] *U.S. v. Brown*, *supra* note 25, 346 F.3d at 812.

than with a probation violation.[27] In the parole context, the Second Circuit has stated that

> [a] parole officer is charged with the duty of enforcing these conditions. To hold that evidence obtained by a parole officer in the course of carrying out this duty cannot be utilized in a subsequent prosecution because evidence obtained directly by the police in such a manner would be excluded, would unduly immunize parolees from conviction.[28]

We find this equally applicable to the probation context.

Green's second assignment of error is without merit.

3. Entrapment

In his third assignment of error, Green contends that the district court erred in not instructing the jury on the defense of entrapment.

[19] When a defendant raises the defense of entrapment, the trial court must determine, as a matter of law, whether the defendant has presented sufficient evidence to warrant a jury instruction on entrapment.[29]

[20-22] The entrapment defense is not of constitutional dimension.[30] In Nebraska, entrapment is an affirmative defense consisting of two elements: (1) the government induced the defendant to commit the offense charged and (2) the defendant's predisposition to commit the criminal act was such that the defendant was not otherwise ready and willing to commit the offense. The burden of going forward with evidence of government inducement is on the defendant.[31] In assessing whether the defendant has satisfied this burden, the initial

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[27] See, *Latta v. Fitzharris*, 521 F.2d 246 (9th Cir. 1975); *United States ex rel. Santos v. New York State Bd. of Par.*, 441 F.2d 1216 (2d Cir. 1971).

[28] *United States ex rel. Santos v. New York State Bd. of Par.*, *supra* note 27, 441 F.2d at 1218.

[29] *State v. Kass*, 281 Neb. 892, 799 N.W.2d 680 (2011).

[30] *United States v. Russell*, 411 U.S. 423, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1973).

[31] *State v. Kass*, *supra* note 29.

duty of the court is to determine whether there is sufficient evidence that the government has induced the defendant to commit a crime.[32] The court makes this determination as a matter of law, and the defendant's evidence of inducement need be only more than a scintilla to satisfy his or her initial burden.[33]

[22,23] This court has also recently approved a variation on the traditional entrapment defense. In *State v. Edwards*,[34] we recognized the defense of entrapment by estoppel, which consists of four elements: (1) the defendant acted in good faith before taking any action; (2) an authorized government official, acting with actual or apparent authority and who had been made aware of all relevant historical facts, affirmatively told the defendant that his conduct was legal; (3) the defendant actually relied on the statements of the government official; and (4) such reliance was reasonable. The same burdens apply for the defense of entrapment by estoppel as do for traditional estoppel.[35]

At trial, Green sought an instruction on traditional entrapment. Specifically, Green proposed the following instruction:

> The state must prove beyond a reasonable doubt that . . . Green was not entrapped into committing the crime of Possession of a Deadly Weapon by a Prohibited Person. Entrapment means that:
>
> 1. The idea for committing the crime of Possession of a Deadly Weapon came from a law enforcement officer; and
>
> 2. a law enforcement officer then talked or persuaded . . . Green into committing the crime of Possession of a Deadly Weapon by a Prohibited Person. Simply giving . . . Green the opportunity to commit the crime of Possession of a Deadly Weapon by a Prohibited Person is not the same as persuading him to commit it; and

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[32] *Id.*

[33] *Id.*

[34] *State v. Edwards*, 286 Neb. 404, 837 N.W.2d 81 (2013).

[35] *Id.*

> 3. . . . Green was not already willing to commit the crime of Possession of a Deadly Weapon by a Prohibited Person before a law enforcement officer talked to him.

In his brief on appeal, Green argues generally that there was a scintilla of evidence to support an entrapment defense because of the testimony of Green's sister, who testified that she asked Foster during the home check if Green could have the sword and knife collection and that Foster told her that the collection was permitted.

But Green now also notes the entrapment by estoppel defense. From his brief on appeal, it is not clear which instruction he now argues he should have had: the traditional entrapment instruction that he requested, or the entrapment by estoppel instruction mentioned in his brief. In his reply brief, Green seems to more clearly suggest that the entrapment by estoppel instruction was appropriate.

As an initial matter, we note that Green cannot predicate error on the district court's failure to give the entrapment by estoppel instruction when it was not asked to give that specific instruction. But in any case, Green is not entitled to an entrapment by estoppel instruction based upon the record.

Here, Green bears the initial burden of showing, among other elements, that he was affirmatively told that he could possess the sword and knife collection. But there is no evidence of that in the record. There is disputed evidence that Green's sister was told that Green could have the collection; but Green's sister is not Green. And there is no evidence that Green's sister ever communicated to Green that the collection was permissible.

There is also evidence that Green reported the collection on paperwork filed with the probation office and assumed that the collection was permitted, because he was not told otherwise. But this was not an affirmative statement from an authorized government official, nor can Green produce the paperwork where he allegedly disclosed this collection.

[24] And the traditional entrapment defense actually sought at trial is also inapplicable in this situation. As noted above, entrapment consists of two elements: (1) the government induced the defendant to commit the offense charged and

(2) the defendant's predisposition to commit the criminal act was such that the defendant was not otherwise ready and willing to commit the offense. Nebraska has adopted the "origin of intent" test for entrapment: "If the intent to commit the crime charged originated with the government rather than the defendant, the defendant was entrapped."[36] Put another way,

> entrapment is established where police officers or their agents incited, induced, instigated, or lured the accused into committing an offense that the person otherwise would not have committed and had no intention of committing. It entails the conception and planning of an offense by an officer and the procurement of its commission by one who would have not perpetrated it, except for the officer's trickery, persuasion, or fraud.[37]

Even assuming that Foster told Green's sister that the collection was permissible, there is no evidence that Foster was attempting to trap Green into being a felon in possession of a weapon. Green already owned the weapons. In fact, the evidence suggests that Foster and the others at the probation office were not even clear that the collection was in violation of the law.

And as with the defense of entrapment by estoppel, because no law enforcement officer told Green that he could have the collection, and at most told only his sister, Green cannot prove that a law enforcement officer "talked or persuaded" him into possessing the collection.

Green's third assignment of error is without merit.

4. Motion for Mistrial

In his fourth assignment of error, Green assigns that the district court erred in denying his motion for mistrial. Green asserts that comments made by the prosecutor during closing argument were prejudicial and entitle him to a mistrial. Green also argues that the prosecutor continued to make such comments even after the court admonished the jury to disregard the personal opinions of the prosecutor.

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[36] *State v. Cain*, 223 Neb. 796, 800, 393 N.W.2d 727, 731 (1986).

[37] 22 C.J.S. *Criminal Law* § 72 at 113-14 (2006).

[25-27] Generally, in assessing allegations of prosecutorial misconduct in closing arguments, a court first determines whether the prosecutor's remarks were improper.[38] It is then necessary to determine the extent to which the improper remarks had a prejudicial effect on the defendant's right to a fair trial.[39] Before it is necessary to grant a mistrial for prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred.[40] A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial.[41]

[28] As an initial matter, it is not clear that the prosecutor's statements were improper. We have held that it is highly improper and generally prejudicial for a prosecuting attorney in a criminal case to declare to the jury his or her personal belief in the guilt of the defendant, unless such belief is given as a deduction from evidence.[42] Here, the prosecutor indicated that he did not know why there was a trial because, in his view, there were no issues left for the jury to decide. The prosecutor then pointed out, correctly, that Green had admitted to every element that the State had to prove. So, while the prosecutor might have referenced his personal beliefs, it appears that such were a deduction from the evidence. Green further argues that the prosecutor persisted in making such statements even after the admonishment. But Green does not specifically direct us to the statements which he now complains about, nor did he object to them at the time.

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[38] *State v. Gresham*, 276 Neb. 187, 752 N.W.2d 571 (2008).

[39] *Id.*

[40] *State v. Floyd*, 272 Neb. 898, 725 N.W.2d 817 (2007), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727.

[41] *Id.*

[42] *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998); *State v. Leonard*, 196 Neb. 731, 246 N.W.2d 68 (1976); *State v. Brooks*, 189 Neb. 592, 204 N.W.2d 86 (1973).

But even assuming that the statements were improper, the remarks were not so prejudicial as to require the granting of a mistrial. The jury was admonished that the attorneys were not permitted to give their personal opinions about the case and that if the jury believed that the prosecutor had done so, it should disregard those statements. A review of the closing arguments as a whole does not suggest that Green was deprived of his right to a fair trial.

Green's fourth assignment of error is without merit.

5. Plea in Abatement and Sufficiency of Evidence

[29] In his fifth and final assignment of error, Green argues that there was insufficient evidence to support his conviction. In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.[43]

Green's argument is primarily premised on the lack of evidence presented that he intended to "threaten or cause harm to anyone."[44] But there is no intent element for the crime of felon in possession of a weapon.[45] The jury concluded that the evidence supported a finding of guilt because Green was a felon and he possessed a knife with a blade in excess of 3½ inches. The State did not have to show, and the jury did not have to find, that Green intended to harm anyone with a knife.

In this case, the parties stipulated that Green was a convicted felon and Green admitted that the sword and knife collection, found in his bedroom, was his. There was sufficient evidence to support Green's conviction.

[30] Green also contends that the district court erred in denying his plea in abatement. He argues that there was insufficient evidence to bind his case over for trial. But any error

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[43] *State v. Watson*, 285 Neb. 497, 827 N.W.2d 507 (2013).

[44] Brief for appellant at 10.

[45] See § 28-1206(1).

in ruling on a plea in abatement is cured by a subsequent finding at trial of guilt beyond a reasonable doubt which is supported by sufficient evidence.[46]

Green's fifth assignment of error is without merit.

VI. CONCLUSION

The decision of the district court is affirmed.

AFFIRMED.

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[46] *State v. McGee*, 282 Neb. 387, 803 N.W.2d 497 (2011).

STATE OF NEBRASKA, APPELLEE, V. ROGER L. DALLAND, APPELLANT.

842 N.W.2d 92

Filed January 24, 2014. No. S-12-615.

1. **Trial: Investigative Stops: Warrantless Searches: Appeal and Error.** The ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo, and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge.
2. **Trial: Witnesses: Evidence.** Where a party without reasonable explanation testifies to facts materially different concerning a vital issue, the change clearly being made to meet the exigencies of pending litigation, such evidence is discredited as a matter of law and should be disregarded. In applying this rule, the important considerations are that the testimony pertains to a vital point, that it is clearly apparent the party has made the change to meet the exigencies of the pending case, and that there is no rational or sufficient explanation for the change in testimony.
3. **Witnesses: Testimony.** Where it is clear that a party as a witness, to meet the exigencies in pending litigation and without reasonable explanation, changes such witness' testimony and then testifies to facts materially different concerning a vital issue, the subsequent and altered testimony from such witness is discredited as a matter of law and should be disregarded.
4. **Witnesses: Testimony: Juries.** An inconsistent or contradictory statement by a witness, who is not a party opponent, is a factor which may affect a jury's evaluation of a witness' credibility or weight to be given such witness' testimony.
5. **Trial: Parties: Witnesses: Testimony.** Testimony altered for trial to meet the exigencies of the pending litigation should be disregarded as a matter of law only if the witness giving the testimony is a party to the action.
6. **Judgments: Appeal and Error.** A correct result will not be set aside merely because the lower court applied the wrong reasoning in reaching that result.

7. **Constitutional Law: Search and Seizure.** The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable searches and seizures.
8. **Search and Seizure: Motor Vehicles: Probable Cause.** A warrantless search of a vehicle is permissible upon probable cause that the vehicle contains contraband.
9. **Probable Cause: Words and Phrases.** Probable cause is a flexible, common-sense standard that depends on the totality of the circumstances.
10. **Probable Cause.** Probable cause to search requires that the known facts and circumstances are sufficient to warrant a person of reasonable prudence in the belief that contraband or evidence of a crime will be found.
11. **Trial: Evidence: Appeal and Error.** In reviewing findings of fact, an appellate court does not reweigh or resolve conflicts in the evidence, but will uphold the trial court's findings of fact unless those findings are clearly erroneous.
12. **Evidence: Appeal and Error.** An appellate court resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.

Petition for further review from the Court of Appeals, SIEVERS, PIRTLE, and RIEDMANN, Judges, on appeal thereto from the District Court for Hamilton County, MICHAEL J. OWENS, Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

Michael P. Kneale, of Bradley, Elsbernd, Andersen, Kneale & Mues Jankovitz, P.C., for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

WRIGHT, J.

NATURE OF CASE

Roger L. Dalland was convicted of possession of a controlled substance after syringes with trace amounts of methamphetamine were discovered during a warrantless search of his vehicle. At a hearing on Dalland's motion to suppress, the State argued that it had probable cause to conduct the search based on the odor of marijuana emanating from Dalland's person or, if that was not sufficient, on an officer's alleged knowledge that there were needles in Dalland's vehicle. The district court found that the odor of marijuana emanating from

Dalland's person established probable cause to search his vehicle. It overruled Dalland's motion to suppress and subsequently convicted Dalland based on the evidence discovered in the search of his vehicle.

On appeal, the Nebraska Court of Appeals reversed, and remanded for a new trial. See *State v. Dalland*, 20 Neb. App. 905, 835 N.W.2d 95 (2013). It concluded that standing alone, the odor of marijuana emanating from Dalland's person did not provide probable cause to search his vehicle, and that the State's additional justification for the search—knowledge of needles used for methamphetamine—was based solely on testimony that should be disregarded as a matter of law. Ultimately, the Court of Appeals concluded that there was no probable cause to search the vehicle. We granted the State's petition for further review and now reverse the decision of the Court of Appeals.

SCOPE OF REVIEW

[1] The ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo, and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge. *In re Interest of Ashley W.*, 284 Neb. 424, 821 N.W.2d 706 (2012).

FACTS

On May 24, 2011, Dalland and his girlfriend, Jennifer Dahl, were interviewed at the law enforcement center in Aurora, Nebraska, about an unrelated matter. As Cpl. Chad Mertz of the Aurora Police Department walked past Dalland in the law enforcement center, Mertz smelled the odor of burnt marijuana coming from where Dalland was sitting. After Dalland finished his interview, he waited for Dahl in the lobby of the law enforcement center and then in his vehicle in the parking lot. He was sitting in the driver's seat of his vehicle in the parking lot when he was confronted by Mertz about the odor. Mertz asked Dalland to exit the vehicle, performed a pat-down search of Dalland's person, and then searched the vehicle. The searches were performed without consent or a warrant.

In the vehicle, Mertz found needles containing trace amounts of methamphetamine. Dalland was subsequently arrested and charged with possession of a controlled substance. Before trial, Dalland moved to suppress the evidence seized in the search of his vehicle.

At the suppression hearing, the parties introduced contradicting evidence about the specifics of the search. Dalland testified that Mertz began searching the vehicle without any knowledge that the vehicle contained drugs, weapons, or drug paraphernalia. According to Dalland, when Mertz asked about the contents of the vehicle prior to the search of the vehicle, Dalland denied that it contained any drugs or weapons. He stated that he did not tell Mertz that there were needles in the vehicle until Mertz had already started the search. Dahl similarly testified that Mertz did not learn about the needles until the search was already in progress. In contrast, Mertz testified that he asked about the needles in the vehicle before searching it. He explicitly denied learning about the needles after he started searching the vehicle.

On cross-examination, Dalland confronted Mertz about a police report that Mertz had filed in the case. Dalland quoted from Mertz' report that stated Dalland had denied having any drugs or drug paraphernalia in the vehicle. When confronted about his report, Mertz reiterated that he learned about the needles in the vehicle before starting the search. He stated that he did not enter the vehicle to search it until after Dalland said there were needles in the vehicle that had been used for methamphetamine. Dalland neither asked Mertz to explain the inconsistencies between his trial testimony and the report nor proffered the report into evidence.

The district court overruled Dalland's motion to suppress. It found that the odor of marijuana was sufficient to establish probable cause for the search of Dalland's vehicle, citing *State v. Watts*, 209 Neb. 371, 307 N.W.2d 816 (1981), and *State v. Reha*, 12 Neb. App. 767, 686 N.W.2d 80 (2004). The court found that Mertz did not search the vehicle until after Dalland informed him that there were needles in the vehicle. However, the court did not rely upon this fact in finding that Mertz had probable cause to search the vehicle.

At a bench trial, the test results establishing that the needles from Dalland's vehicle contained methamphetamine were admitted over Dalland's objection. Dalland was found guilty of possession of a controlled substance and sentenced to 270 days' incarceration.

Dalland timely appealed, alleging the district court erred by overruling his motion to suppress and by receiving the evidence that was the subject of the motion to suppress. He did not challenge the court's decision that the search of his person was constitutional. He admitted that Mertz was justified in approaching Dalland about the odor of marijuana on his person, but argued that Mertz violated Dalland's Fourth Amendment rights when Mertz "extend[ed] the search to include Dalland's vehicle." See brief for appellant at 7.

The issue was whether there was probable cause to search Dalland's vehicle. The Court of Appeals concluded that the district court erred in finding probable cause for the search of Dalland's vehicle based solely upon the odor of marijuana emanating from his person. See *State v. Dalland*, 20 Neb. App. 905, 835 N.W.2d 95 (2013). It distinguished *Watts*, *supra*, and all of the cases upon which *Watts* relied, because they "involved traffic stops and situations in which the officer smelled the marijuana emanating from the vehicle." *Dalland*, 20 Neb. App. at 911, 835 N.W.2d at 100. The Court of Appeals explained:

> Given that the odor remained on Dalland the entire time he was at the law enforcement center, we can ascertain that the odor lingered on his person for a substantial period of time. . . . The lasting nature of Dalland's odor, combined with the lack of evidence in Dalland's immediate vicinity, raised the question of where Dalland encountered marijuana and acquired the odor. While Dalland may have encountered it in his vehicle, he may have encountered it any number of ways and in any number of locations throughout the day.

Id. at 914, 835 N.W.2d at 102. Accordingly, the Court of Appeals held that the district court erred in concluding that the odor of marijuana on Dalland's person alone was probable cause to search his vehicle.

On appeal, the State argued that there was probable cause to search Dalland's vehicle if the odor of marijuana on Dalland's person was considered in conjunction with Mertz' testimony that prior to the search, he learned the vehicle contained needles used for methamphetamine. Mertz' testimony was the only evidence to support the State's assertion that Mertz knew about the needles before the search. But the Court of Appeals concluded that Mertz' testimony should be disregarded as a matter of law because it found that Mertz, without a reasonable explanation, had changed his testimony from that given in a probable cause affidavit in order to meet the exigencies of trial. Without this testimony, the evidence showed that Mertz did not learn about the needles until after starting the search and that the only basis for the search was the odor of marijuana on Dalland's person, which the Court of Appeals concluded was not sufficient to establish probable cause. In the absence of probable cause, the needles were improperly admitted as the fruit of an illegal search. Therefore, the Court of Appeals reversed the judgment of the district court and remanded the cause for a new trial. We subsequently granted the State's petition for further review.

ASSIGNMENTS OF ERROR

On further review, the State assigns, restated, that the Court of Appeals erred (1) by relying on Mertz' probable cause affidavit to discredit his trial testimony even though the affidavit was not in evidence or discussed at the suppression hearing; (2) by concluding that Mertz was a "party," such that the Court of Appeals could disregard his trial testimony about the needles as a matter of law; and (3) by holding that the smell of marijuana alone did not provide probable cause to search the vehicle. The central question to which all three of the State's assignments of error point is whether there was probable cause for the search of Dalland's vehicle.

ANALYSIS

Because the Court of Appeals concluded as a matter of law that Mertz' testimony regarding Dalland's statements about the needles in the vehicle should be disregarded, we examine

whether the Court of Appeals erred in disregarding this testimony or in determining, based on the remaining evidence, that there was no probable cause.

Summary of Arguments

The State claims that Mertz had probable cause to conduct the warrantless search of Dalland's vehicle based upon the odor of marijuana on Dalland's person and Dalland's statement to Mertz before the search that there were needles in the vehicle.

Dalland claims that Mertz began the search before Mertz learned there were needles in the vehicle and that the odor of marijuana on Dalland's person did not provide probable cause to search his vehicle.

The district court found that Mertz began the search after he was told about the needles, but it did not rely upon this fact in overruling Dalland's motion to suppress. It concluded that the odor of marijuana was sufficient to establish probable cause for the warrantless search.

The Court of Appeals reversed the judgment of the district court, holding that (1) the odor of marijuana emanating from Dalland's person was not probable cause to search the vehicle and (2) Mertz' trial testimony about searching the vehicle only after Dalland stated there were needles inside must be disregarded as a matter of law.

Disregarding Mertz' Testimony

Throughout this case, the State has argued that there was probable cause to search Dalland's vehicle because in addition to detecting the smell of marijuana, Mertz learned before he initiated a search of the vehicle that it contained needles used for methamphetamine. Mertz testified that before he began the search, Dalland said that there were needles in the vehicle. The State alleges the Court of Appeals erred by concluding that Mertz changed his testimony for the exigencies of trial and was a "party," such that his inconsistent trial testimony about the needles should be disregarded as a matter of law. We conclude that the Court of Appeals erred in disregarding Mertz' trial testimony.

[2] A court may disregard witness testimony, as a matter of law, under certain circumstances: "Where a party without reasonable explanation testifies to facts materially different concerning a vital issue, the change clearly being made to meet the exigencies of pending litigation, such evidence is discredited as a matter of law and should be disregarded." *Riggs v. Nickel*, 281 Neb. 249, 253, 796 N.W.2d 181, 185 (2011). In applying this rule, the important considerations are that the testimony pertains to a vital point, that it is clearly apparent the party has made the change to meet the exigencies of the pending case, and that there is no rational or sufficient explanation for the change in testimony. *Id.*

In prior cases, we have stated that under this proposition, only the inconsistent testimony of a party as a witness is subject to this rule. See, e.g., *Ketteler v. Daniel*, 251 Neb. 287, 556 N.W.2d 623 (1996); *State v. Osborn*, 241 Neb. 424, 490 N.W.2d 160 (1992); *State v. Robertson*, 223 Neb. 825, 394 N.W.2d 635 (1986); *Insurance Co. of North America v. Omaha Paper Stock, Inc.*, 189 Neb. 232, 202 N.W.2d 188 (1972); *Clark v. Smith*, 181 Neb. 461, 149 N.W.2d 425 (1967); *Sacca v. Marshall*, 180 Neb. 855, 146 N.W.2d 375 (1966). But we have refused to extend the rule to nonparty witnesses. See *Ketteler, supra*.

As it is used in this proposition, the term "party" refers only to those who are named in an action. In *Sacca, supra*, we applied the rule only to plaintiffs. But in *Momsen v. Nebraska Methodist Hospital*, 210 Neb. 45, 313 N.W.2d 208 (1981), we noted that application of this rule is not limited to plaintiffs but applies to any party. In more recent cases, we have held that the rule applies only to "a party opponent." See *Osborn*, 241 Neb. at 431, 490 N.W.2d at 166. Accord *Robertson, supra*. A witness of the State is not a party subject to this rule. See, *Osborn, supra*; *Robertson, supra.*

[3-5] The inconsistent testimony of a witness who is a party to the action is treated differently from a nonparty witness.

> Where it is clear that a party as a witness, to meet the exigencies in pending litigation and without reasonable explanation, changes such witness' testimony and then testifies to facts materially different concerning a vital

> issue, the subsequent and altered testimony from such witness is discredited as a matter of law and should be disregarded. . . . Otherwise, an inconsistent or contradictory statement by a witness, who is not a party opponent, is a factor which may affect a jury's evaluation of a witness' credibility or weight to be given such witness' testimony.

Robertson, 223 Neb. at 828-29, 394 N.W.2d at 637 (citations omitted). In other words, testimony altered for trial to meet the exigencies of the pending litigation should be disregarded as a matter of law only if the witness giving the testimony is a party to the action. Contradictory testimony given by a nonparty witness is considered and weighed by the trier of fact and may be taken into account by the trier of fact when determining credibility. See *Osborn*, *supra*.

Mertz is not a party to the instant case. The Court of Appeals should not have disregarded Mertz' testimony as a matter of law and should have given deference to the district court's finding of fact that Mertz was told about the needles prior to the search.

Probable Cause for Search

[6] When we consider Mertz' testimony that Dalland told him about the needles before the search, we conclude that the district court did not err in overruling Dalland's motion to suppress and admitting the evidence obtained from the search of the vehicle. Although probable cause was established for different reasons than stated by the court, we conclude there was probable cause for the search. "[A] correct result will not be set aside merely because the lower court applied the wrong reasoning in reaching that result." *State v. Chiroy Osorio*, 286 Neb. 384, 389, 837 N.W.2d 66, 70 (2013).

[7,8] The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable searches and seizures. *State v. Wiedeman*, 286 Neb. 193, 835 N.W.2d 698 (2013). But a warrantless search of a vehicle is permissible upon probable cause that the vehicle contains contraband. See *California v. Carney*, 471 U.S. 386, 105 S. Ct. 2066, 85 L. Ed. 2d 406 (1985).

[9,10] Probable cause is a flexible, commonsense standard that depends on the totality of the circumstances. *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011). Probable cause to search requires that the known facts and circumstances are sufficient to warrant a person of reasonable prudence in the belief that contraband or evidence of a crime will be found. *J.P. v. Millard Public Schools*, 285 Neb. 890, 830 N.W.2d 453 (2013).

[11,12] In the instant case, a critical factor in the probable cause analysis is when Mertz learned about the needles in Dalland's vehicle. The district court made a finding of fact that Mertz learned about the needles before he began to search Dalland's vehicle. In reviewing findings of fact, we "[do] not reweigh or resolve conflicts in the evidence, but will uphold the trial court's findings of fact unless those findings are clearly erroneous." *State v. Thompson*, 244 Neb. 189, 192, 505 N.W.2d 673, 676 (1993). Additionally, we resolve evidentiary conflicts in favor of the successful party, who is entitled to "every reasonable inference deducible from the evidence." See *State v. Pullens*, 281 Neb. 828, 837, 800 N.W.2d 202, 214 (2011).

The district court was presented with two plausible but conflicting accounts of the events surrounding the search of Dalland's vehicle. Both Dalland and Dahl testified that Mertz asked about the needles after he entered the vehicle to perform the search. But Mertz stated at several points throughout his testimony that he learned the vehicle contained needles used for methamphetamine *before* he searched the vehicle. On cross-examination, Dalland quoted from the police report, without offering it into evidence, to "refresh [Mertz'] recollection" whether Dalland told him about the needles before or after starting to search the vehicle. When so confronted, Mertz agreed his report stated that Dalland denied having any drugs or paraphernalia. But immediately thereafter, Mertz denied that he learned about the needles during the search of the vehicle and insisted that he asked about the needles while he was searching Dalland and before searching the vehicle. Mertz testified he was confident that he asked Dalland about the needles while he was searching Dalland's person because

Mertz had never searched an individual without asking about sharp objects such as needles.

The district court's decision to accept Mertz' version of the facts over that of Dalland and Dahl was not clearly erroneous. The weight and credibility of the testimony of these witnesses was for the trier of fact. See *Thompson, supra*. Mertz consistently testified that Dalland mentioned the needles before Mertz started to search the vehicle. We give due weight to the district court's determination that Mertz learned about the needles before he began to search Dalland's vehicle. See *In re Interest of Ashley W.*, 284 Neb. 424, 821 N.W.2d 706 (2012).

Since Mertz learned prior to searching Dalland's vehicle that it contained needles used for methamphetamine, Mertz could reasonably believe that he would find drug paraphernalia or other contraband in the vehicle. This reasonable belief was only strengthened by the fact that there was an odor of marijuana emanating from Dalland's person. The combination of the odor and Dalland's statement *prior to the search* that the vehicle contained needles used for methamphetamine supplied facts and circumstances sufficient to warrant a person of reasonable prudence in the belief that contraband would be found in the vehicle. The district court did not err in overruling Dalland's motion to suppress the evidence found as a result of the search of Dalland's vehicle and admitting that evidence at trial.

Because we find probable cause for the search based on the combined facts that Dalland smelled of burnt marijuana and that he admitted prior to the search of his vehicle to having needles in the vehicle, we do not reach the question whether the odor of marijuana emanating from Dalland was sufficient to establish probable cause.

CONCLUSION

For the aforementioned reasons, we reverse the decision of the Court of Appeals and remand the cause with direction that the Court of Appeals issue a judgment affirming Dalland's conviction and sentence.

REVERSED AND REMANDED WITH DIRECTION.

ADAM LILJESTRAND, APPELLEE, V. DELL ENTERPRISES, INC., DOING BUSINESS AS THE DUNDEE DELL, APPELLANT.
842 N.W.2d 575

Filed January 24, 2014. No. S-13-063.

1. **Appeal and Error.** The construction of a mandate issued by an appellate court presents a question of law.
2. **Constitutional Law: Due Process.** Whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.
3. **Courts: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
4. **Judges: Evidence.** Generally, a successor judge may not make a decision based on conflicting evidence that a predecessor judge heard.
5. **Trial: Judges: Due Process: Witnesses.** Due process entitles a litigant to have all the evidence submitted to a single judge who can see the witnesses testify and, thus, weigh their testimony and judge their credibility.

Appeal from the Workers' Compensation Court: THOMAS E. STINE, Judge. Reversed and remanded for a new trial.

Thomas M. Locher and Joseph J. Kehm, of Locher, Pavelka, Dostal, Braddy & Hammes, L.L.C., and, on brief, Robert H. Grennan for appellant.

Ronald E. Frank and Harry A. Hoch III, of Sodoro, Daly, Shomaker & Selde, P.C., L.L.O., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

CONNOLLY, J.

SUMMARY

This workers' compensation appeal presents a due process issue. The original trial judge retired while the case was on appeal. The original trial judge found that the appellee, Adam Liljestrand, was permanently and totally disabled. The appellant, Dell Enterprises, Inc., doing business as The Dundee Dell (Dell), sought review with a three-judge review panel. The review panel remanded the cause because it was not clear how the judge had treated the presumption of correctness afforded to the vocational rehabilitation specialist's opinion of

Liljestrand's disability. Dell appealed, and the Nebraska Court of Appeals affirmed.[1] But it left it to the chief judge of the Workers' Compensation Court how to instruct the new trial judge on remand.

On remand, the case was assigned to a new trial judge, who reviewed the record and issued an order without an evidentiary hearing. The new trial judge found that Liljestrand had rebutted the presumption afforded to the specialist's opinion. We granted Dell's motion to bypass the Court of Appeals. We conclude that this procedure violated due process because the witnesses' credibility was relevant to the issues presented at trial. We reverse the order and remand the cause for a new trial.

BACKGROUND

Liljestrand originally injured his back in September 2001 while he was working for Dell as a bartender. After surgery, Liljestrand was given work restrictions of 30 pounds for lifting and no repetitive bending or twisting. He required alternative sitting or standing every 2 hours. In September 2002, the agreed-upon vocational rehabilitation specialist, Ronald Schmidt, concluded that Liljestrand had sustained a 60- to 65-percent loss of earning power. Schmidt recommended that Liljestrand attend college for retraining as a financial advisor. The original trial court awarded Liljestrand vocational rehabilitation, which ended in 2004. Liljestrand eventually secured a job as an independent contractor providing financial advice to clients regarding insurance and mutual funds. But he reported that the narcotic pain medications he had to take for his back pain made him groggy and sleepy. He felt unable to advise clients about their financial affairs. Because of his lack of mental acuity and inability to sit for prolonged periods, he also could not perform the work in a subsequent position he took in recruiting nurses. He was last employed in May 2008.

In 2010, the surgeon reexamined Liljestrand and determined that he was suffering from mechanical low-back pain

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[1] *Liljestrand v. Dell Enters.*, No. A-11-925, 2012 WL 3591087 (Neb. App. Aug. 21, 2012) (selected for posting to court Web site).

and referred him to a pain clinic. He concluded that the restrictions that he originally ordered had not changed but deferred to the judgment of physicians who were currently treating Liljestrand's pain. A different physician, however, determined that Liljestrand had scar tissue from the surgery and further disk herniation that was causing his current pain. He diagnosed Liljestrand with "failed back syndrome" and determined that his condition had deteriorated since his 2002 loss of earning power evaluation. He believed that Liljestrand's medications were appropriate and that he was totally disabled.

In November 2010, Liljestrand's then vocational rehabilitation specialist, Stephen Schill, prepared a loss of earning capacity report. Schill believed that Liljestrand was unemployable and was permanently and totally disabled. In January 2011, Schmidt, the 2002 specialist, provided an updated loss of earning capacity report. Schmidt determined that Liljestrand had access to many sedentary jobs and that his loss of earning capacity was 34 percent. He discredited Schill's analysis and noted that Liljestrand's ability to care for his two preschool daughters while his wife worked showed that he had some flexibility and strength.

At the 2011 hearing, the sole issue was the nature and extent of Liljestrand's permanent disability. The trial court found Liljestrand's testimony credible that he needed his current medications to control his back pain and that these medications reduced his mental acuity. The judge concluded that Liljestrand's loss of earning capacity had increased since the original assessment and that he was completely disabled as of October 2010 because of the effect of his medications, coupled with his physical restrictions. He did not mention the rebuttable presumption of correctness afforded to Schmidt's report.[2] The review panel concluded that it could not tell whether the trial judge had considered the presumption afforded Schmidt's report and determined that it must remand the cause for that purpose.

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[2] See Neb. Rev. Stat. § 48-162.01(3) (Reissue 2010).

Court of Appeals' Decision

On appeal, the Court of Appeals determined that the review panel's order was final because it effectively vacated the trial judge's order, thus affecting Liljestrand's substantial right:

> We think it goes without saying that a remand to a lower tribunal of necessity cancels out all or part of the lower tribunal's original decision. . . . .
>
> . . . [W]hen the review panel's decision is read in its entirety, it is clear that the intent was a remand for determination of the applicability of the presumption of correctness to Schmidt's opinion, or whether such had been overcome by rebutting evidence from Schill. . . .
>
> . . . [I]t is clear that the effect of the remand, of necessity, is to take away the award of permanent total disability from Liljestrand. Without this appeal, there would be further proceedings by the trial judge to determine the extent of permanent disability. The trial judge is directed to determine the applicability of the statutory presumption concerning the agreed-upon vocational rehabilitation counselor's second opinion rendered January 21, 2011—necessarily meaning that the trial judge must decide the case anew after the consideration of the issue and evidence which was not discussed in the trial judge's original decision. Accordingly, Liljestrand's substantial right is affected, as he has now lost his permanent and total disability award.[3]

The Court of Appeals declined to infer that the trial judge had found the presumption rebutted, because Workers' Comp. Ct. R. of Proc. 11 (2011), as amended, requires sufficient findings to provide meaningful appellate review:

> In this case, we need factual findings and a rationale concerning whether the presumption of correctness applied or had been rebutted . . . . Our jurisprudence is that in such circumstance, the remedy is to remand to the trial judge for a determination of the unresolved issue, upon the previous record. . . . We note in passing that in *Hale*,

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[3] *Liljestrand*, *supra* note 1, 2012 WL 3591087 at *4-5.

> *supra*,[4] the Supreme Court vacated the trial judge's decision on the issue where there was no compliance with Rule 11. This result serves to reinforce our conclusion in our jurisdiction discussion that the review panel's decision in the instant case affects Liljestrand's substantial rights and that thus, the review panel's decision is appealable.[5]

But the Court of Appeals noted that the trial judge had retired and could not render the new decision: "Thus, we leave the determination of who shall become the trial judge and follow the directions of the review panel in the hands of the chief judge of the compensation court."[6]

Proceedings on Remand

The case was assigned to a new judge on remand, without instructions to conduct a new hearing. In December 2012, the new trial judge issued an "Award on Mandate" order. He concluded that the Court of Appeals' mandate required him to review the previous record and issue a new order. After reviewing the record, he concluded that the evidence presented at the trial had rebutted Schmidt's updated report. He noted that at the 2011 hearing, Schmidt believed Liljestrand's loss of earning capacity had decreased because of his vocational training. But Schmidt had admitted that he did not know the effect that Liljestrand's medications would have on his employability. The new trial judge concluded that Schmidt had not attempted to verify the effect of these medications but that the second physician's report had documented the effect of the medications. Because Schmidt did not consider this report or Liljestrand's reports of his actual experiences, his opinion was incorrect. In addition, based on the previous record, the new trial judge ruled that Liljestrand was permanently and totally disabled as of October 5, 2010, and awarded him permanent disability benefits of $508 per week.

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[4] See *Hale v. Standard Meat Co.*, 251 Neb. 37, 554 N.W.2d 424 (1996).

[5] *Liljestrand*, *supra* note 1, 2012 WL 3591087 at *6.

[6] *Id.* at *7.

ASSIGNMENTS OF ERROR

Dell assigns that the court erred in (1) failing to conduct a new trial or abide by procedural due process requirements and (2) finding that Liljestrand was permanently and totally disabled.

STANDARD OF REVIEW

[1-3] The construction of a mandate issued by an appellate court presents a question of law.[7] Whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.[8] We independently review questions of law decided by a lower court.[9]

ANALYSIS

Dell contends that the new trial judge violated its due process rights by issuing an order without notice or an opportunity to be heard on the meaning of the mandate, to present evidence, or to cross-examine witnesses. Dell argues the procedure was constitutionally deficient because a workers' compensation judge is the sole judge of the witnesses' credibility and the successor judge had no opportunity to assess their credibility. Instead, Dell argues the successor trial judge acted as an appellate judge by issuing an order based solely from his reading the record. It cites cases from other jurisdictions holding that due process requires a decision to be entered by the judge who heard the evidence and observed the witnesses.

Liljestrand, of course, sees it differently. He argues that the only issue on remand was whether the evidence had rebutted the presumption of correctness afforded Schmidt's report and that due process did not require a new trial on all the issues. But this argument ignores the effect of the Court of Appeals' decision and the trial court's rulings on remand.

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[7] *Pennfield Oil Co. v. Winstrom*, 276 Neb. 123, 752 N.W.2d 588 (2008).

[8] *Travelers Indem. Co. v. Gridiron Mgmt. Group*, 281 Neb. 113, 794 N.W.2d 143 (2011).

[9] *Moyera v. Quality Pork Internat.*, 284 Neb. 963, 825 N.W.2d 409 (2013).

The Court of Appeals found that it had jurisdiction over the first appeal because the effect of the review panel's remand was to "take away" the award of permanent total disability.[10] The Court of Appeals further stated that deciding whether the presumption of correctness was rebutted would necessarily mean that the new trial judge "must decide the case anew."[11] The correctness of these conclusions are not before us, but the decision can only reasonably be interpreted as concluding that the award order was vacated by the Court of Appeals' affirmance.

That conclusion was the law of the case on remand, and the successor trial judge accordingly treated the original order as vacated. He did not limit his order to whether the evidence had rebutted the presumption. He also ruled on Liljestrand's entitlement to disability benefits, and Liljestrand argues on appeal that this finding was correct.

[4,5] State courts generally agree that a successor judge may not make a decision based on conflicting evidence that a predecessor judge heard,[12] although courts sometimes differ when the parties have consented to the procedure or have agreed to the facts underlying an issue of law.[13] We agree with this general rule. It rests upon the principle that "due process entitles a litigant to have all the evidence submitted to a single judge who can see the witnesses testify and, thus weigh their testimony and judge their credibility."[14]

Moreover, the rule is consistent with the reason that we defer to a trial court's findings of fact. We have stated that

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[10] *Liljestrand*, *supra* note 1, 2012 WL 3591087 at *5.

[11] *Id*.

[12] See Annot., 84 A.L.R.5th 399 (2000).

[13] Compare *Smith v. Freeman*, 232 Ill. 2d 218, 902 N.E.2d 1069, 327 Ill. Dec. 683 (2009) (parties may waive their due process right to have issues decided by successor judge if waiver is knowing, intelligent act), with *Moore Golf v. Lakeover Golf & Country Club*, 49 A.D.2d 583, 370 N.Y.S.2d 156 (1975) (holding that despite parties' stipulation to procedure, new trial was necessary where case hinged on credibility of trial witnesses).

[14] See *Smith*, *supra* note 13, 232 Ill. 2d at 223, 902 N.E.2d at 1071, 327 Ill. Dec. at 685.

in a bench trial of an action at law, the trial court is the sole judge of the witnesses' credibility and the weight to be given their testimony.[15] Even under more lenient standards of review, we generally defer to a trial court's assessment of conflicting evidence because the trial court had the advantage of hearing and observing important parts of evidence that are not readily apparent from a cold record.[16] These principles weigh against a successor judge's making findings of fact from a transcript of proceedings before a different judge.

We need not consider here any exceptions that other courts have recognized because none are presented by this record. The parties did not consent to this procedure, and they clearly presented conflicting evidence at the original hearing whether the presumption should be rebutted. Moreover, the issues involved the credibility of witnesses.

It is true that Schmidt admitted to not considering the effect of pain medications on Liljestrand's ability to work. But he also testified that no physician provided him with restrictions based on Liljestrand's medications and that Nebraska law prohibited him from investigating this information himself. Liljestrand challenged this assertion. Similarly, Dell challenged both Liljestrand and his wife about why they would leave their two young children in Liljestrand's care if he could not drive or care for their needs because of his medications or physical restrictions. These witnesses' credibility was clearly at issue both for determining whether the presumption of correctness afforded Schmidt's opinion had been rebutted and whether Liljestrand was totally disabled.

We reverse, because the successor judge's ruling on these issues without a new evidentiary hearing violated Dell's right to due process. We remand the cause to the Workers' Compensation Court for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

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[15] *Henderson v. City of Columbus*, 285 Neb. 482, 827 N.W.2d 486 (2013).

[16] See, e.g., *Caniglia v. Caniglia*, 285 Neb. 930, 830 N.W.2d 207 (2013); *U.S. Cold Storage v. City of La Vista*, 285 Neb. 579, 831 N.W.2d 23 (2013); *Coffey v. Coffey*, 11 Neb. App. 788, 661 N.W.2d 327 (2003).

American Family Mutual Insurance Company, appellee and cross-appellee, v. Rick W. Wheeler, appellee and cross-appellant, and Joshua McCrary et al., appellants.

842 N.W.2d 100

Filed January 24, 2014. No. S-13-240.

1. **Insurance: Contracts: Appeal and Error.** An insurance policy's interpretation presents a question of law that an appellate court decides independently of the trial court.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the court granted the judgment and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Insurance: Contracts: Appeal and Error.** An insurance policy is a contract. An appellate court construes insurance contracts like any other contract, according to the meaning of the terms that the parties have used.
4. ____: ____: ____. When an insurance contract's terms are clear, an appellate court gives them their plain and ordinary meaning as a reasonable person in the insured's position would understand them.
5. **Insurance: Contracts: Words and Phrases: Appeal and Error.** When an insurance contract is ambiguous, an appellate court will construe the policy in favor of the insured. A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
6. **Insurance: Contracts: Appeal and Error.** An appellate court's goal in interpreting insurance policy language is to give effect to each provision of the contract.

Appeal from the District Court for Sarpy County: David K. Arterburn, Judge. Affirmed.

David A. Domina, Brian E. Jorde, and Jeremy R. Wells, of Domina Law Group, P.C., L.L.O., for appellants Joshua McCrary et al.

Betty L. Egan, of Walentine, O'Toole, McQuillan & Gordon, L.L.P., for appellee Rick W. Wheeler.

Jane D. Hansen for appellee American Family Mutual Insurance Company.

Heavican, C.J., Connolly, Stephan, McCormack, Miller-Lerman, and Cassel, JJ.

CONNOLLY, J.

SUMMARY

Ryan Wheeler, Rick Wheeler's son, allegedly sexually assaulted Joshua McCrary and Maren McCrary's minor daughter, C.M. The McCrarys sued Rick for negligence. American Family Mutual Insurance Company (American Family), Rick's liability insurer, sought a declaratory judgment that its policies did not cover Rick, which request the district court granted. The primary issue is whether a severability clause, which requires that the insurance be applied separately to each insured, changes the effect of (or renders ambiguous) exclusions which would otherwise bar coverage for Rick. We conclude that it does neither. We affirm.

BACKGROUND

INSURANCE POLICIES

Rick has two liability insurance policies with American Family: a homeowners' policy that includes personal liability coverage and a separate personal liability umbrella policy. Both he and Ryan are insureds under the policies. Both policies provide personal liability coverage; the homeowners' policy, for example, provides coverage for "compensatory damages for which any insured is legally liable because of bodily injury or property damage caused by an occurrence." Both policies define an "occurrence," as an accident or exposure to conditions which results in bodily injury or property damage.

Both policies also contain a long list of exclusions from coverage. As relevant here, the homeowners' policy contains exclusions for "Abuse" and "Intentional Injury." The "Abuse" exclusion reads:

> We will not cover bodily injury or property damage for any insured who participates in, acquiesces to or in any way directs any act of sexual molestation or contact, corporal punishment, or physical or mental abuse of a sexual nature.

The "Intentional Injury" exclusion reads:

> We will not cover bodily injury or property damage caused intentionally by or at the direction of any insured

> even if the actual bodily injury or property damage is different than that which was expected or intended from the standpoint of any insured.

As relevant here, the umbrella policy also contains exclusions for "Sexual Abuse" and "Intentional Injury." The "Sexual Abuse" exclusion reads:

> We will not cover injury arising out of or resulting from any:
>
> a. Actual or alleged sexual molestation;
>
> b. Corporal punishment; or
>
> c. Physical or mental abuse of a person by an insured.

The "Intentional Injury" exclusion reads:

> We will not cover injury caused by or at the direction of any insured even if the actual injury is different than that which was expected or intended from the standpoint of any insured. This exclusion does not apply to personal injury when your actions are not fraudulent, criminal or malicious.

Both policies contain identical "Severability of Insurance" clauses, which provide: "This insurance applies separately to each insured. This condition will not increase our limit for any one occurrence."

Factual and Procedural Background

The McCrarys sued Rick and Ryan for Ryan's alleged sexual assault of C.M. The McCrarys sued Ryan for intentional assault, and the McCrarys sued Rick for negligently failing to warn the McCrarys of Ryan's dangerous nature and for negligently supervising Ryan. Rick submitted a claim for coverage to American Family for the McCrarys' claims against him. American Family assumed Rick's defense under a reservation of rights.

After doing so, American Family filed a complaint for declaratory judgment. Specifically, American Family—based on Ryan's alleged intentional conduct and the exclusions in its policies—sought a judgment that its policies did not "provide liability coverage to Rick . . . for the claims of the [McCrary]

Defendants and that American Family [had] no duty to defend or indemnify Rick . . . in the [McCrary] lawsuit." Rick and the McCrarys both filed answers generally contesting American Family's position and requesting attorney fees.

American Family then moved for summary judgment, which the district court granted. The court, after reciting the general factual and procedural history, noted that the parties did not dispute that Ryan's alleged conduct was both an intentional act and sexual molestation or abuse. The court noted that all of the parties agreed that the policies did not provide coverage for Ryan.

The court then recited the various exclusions in the insurance policies. Relying on *Volquardson v. Hartford Ins. Co.*,[1] the court ruled that the "an insured" and "any insured" language contained in the exclusions was clear and unambiguous. The court concluded:

> [I]t is clear that the loss claimed by Defendants McCrary was caused intentionally by someone insured under the policy. Additionally, the loss claimed by Defendants McCrary was caused by the sexual abuse committed by Ryan . . . , an insured under the policy. As such, the intentional act exclusion and the sexual abuse exclusion exclude[] coverage to all insureds.

The court then addressed the effect, if any, of the "Severability of Insurance" clause on the policies' coverage. The court noted that this was an issue of first impression in Nebraska and that in other jurisdictions, a split in authority existed. After analyzing cases addressing the issue,[2] the court concluded that "the clear language of the exclusions in [the] policies bar[s] coverage to [Rick] for the claims being made by Defendants McCrary, irrespective of the severability clause." The court granted American Family summary judgment.

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[1] *Volquardson v. Hartford Ins. Co.*, 264 Neb. 337, 647 N.W.2d 599 (2002).

[2] See, e.g., *American Family Mut. Ins. Co. v. Bower*, 752 F. Supp. 2d 957 (N.D. Ind. 2010); *Chacon v. American Family Mut. Ins. Co.*, 788 P.2d 748 (Colo. 1990); *Caroff v. Farmers Ins. Co. of Wash.*, 155 Wash. App. 724, 261 P.3d 159 (1999).

ASSIGNMENTS OF ERROR

The McCrarys assign, restated, that the court erred in (1) ruling that the "Severability of Insurance" clause did not require that Rick's coverage be determined based solely on Rick's conduct; (2) ruling that the "Severability of Insurance" clause did not create ambiguity in the policies' coverage; and (3) failing to award the McCrarys attorney fees.

On cross-appeal, Rick assigns that the court erred in making any rulings as to Ryan, over whom it did not have personal jurisdiction.

STANDARD OF REVIEW

[1,2] An insurance policy's interpretation presents a question of law that we decide independently of the trial court.[3] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the court granted the judgment and gives such party the benefit of all reasonable inferences deducible from the evidence.[4]

ANALYSIS

The parties agree that if there were no severability clause, the exclusions would bar coverage for Rick (based on Ryan's conduct). The issue, then, is whether the severability clause affects the exclusions' otherwise clear application. The McCrarys argue that the effect of the severability clause is to treat each insured as if he had his own insurance policy. That being the case, and because Rick's liability hinges on his own alleged negligence,[5] the McCrarys argue coverage for Rick must be determined based solely on Rick's alleged negligence. And if that were true, the policies would cover Rick. Alternatively, the McCrarys argue that the severability clause (when read with

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[3] See, e.g., *Federated Serv. Ins. Co. v. Alliance Constr.*, 282 Neb. 638, 805 N.W.2d 468 (2011)

[4] *Id.*

[5] See, *Sinsel v. Olsen*, 279 Neb. 38, 777 N.W.2d 54 (2009); *Popple v. Rose*, 254 Neb. 1, 573 N.W.2d 765 (1998), *abrogated on other grounds, A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010).

the exclusions) at least renders the policies ambiguous, which we must construe in favor of coverage.

[3-5] We begin by setting forth certain well-known principles for interpreting insurance policies. An insurance policy is a contract.[6] We construe insurance contracts like any other contract, according to the meaning of the terms that the parties have used.[7] When an insurance contract's terms are clear, we give them their plain and ordinary meaning as a reasonable person in the insured's position would understand them.[8] But when an insurance contract is ambiguous, we will construe the policy in favor of the insured.[9] A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.[10]

The severability clause in each policy reads: "This insurance applies separately to each insured. This condition will not increase our limit for any one occurrence." Severability clauses are common in insurance contracts, as is this particular language.[11] Historically, severability clauses became part of the standard insurance industry form contract in 1955 to clarify "'what insurance companies had intended all along, namely that the term "the insured" in an exclusion refer[red] merely to the insured claiming coverage.'"[12] As noted by the parties, however, the question is not how the severability clause affects exclusions referencing "the insured," but, rather, how it affects exclusions (such as the ones in this case) referencing "an insured" or "any insured."

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[6] *Guerrier v. Mid-Century Ins. Co.*, 266 Neb. 150, 663 N.W.2d 131 (2003).

[7] See *Federated Serv. Ins. Co.*, *supra* note 3.

[8] See *id.*

[9] See *Guerrier*, *supra* note 6.

[10] *Id.*

[11] See, e.g., *United Services Auto. Ass'n v. Neary*, 307 P.3d 907 (Alaska 2013).

[12] *Michael Carbone, Inc. v. General Acc. Ins. Co.*, 937 F. Supp. 413, 419 (E.D. Pa. 1996) (citing *State, Dept. of Transp. v. Houston Cas.*, 797 P.2d 1200 (Alaska 1990)). See, also, *Ohio Cas. Ins. Co. v. Holcim (US)*, 744 F. Supp. 2d 1251 (S.D. Ala. 2010).

Courts across the country have grappled with this issue, and there is a split in authority.[13] Commentators also disagree.[14] A majority conclude that severability clauses do not nullify plainly worded exclusions and that they therefore have no effect on exclusions referencing "an insured" or "any insured."[15] A minority conclude that severability clauses require that "insurance coverage and any exclusion of coverage . . . be judged [solely] on the basis of [each insured's] particular conduct and acts within [the insured's] control."[16] Or at the very least, they conclude that severability clauses create ambiguity as to the scope of exclusions referencing "an insured" or "any insured," which a court must construe in favor of coverage.[17]

A good example of the rationale behind the majority position is *American Family Mutual Ins. Co. v. Corrigan*.[18] In that case, Mark Francke pleaded guilty to child endangerment for injuries suffered by Jeffrey and Kirsten Corrigan's child while at Mark's daycare. Mark ran his daycare in the home of his father, Harold Francke. The Corrigans sued Mark "based on his allegedly negligent, reckless, and/or intentional conduct resulting in serious harm to" their child, and they sued Harold for various claims of negligence, including failure to warn and failure to supervise.[19] Harold's liability insurer sought a declaratory judgment that its policy did not cover the claims.

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[13] Compare, e.g., *Holcim (US), supra* note 12, and *American Family Mut. Ins. Co. v. Corrigan*, 697 N.W.2d 108 (Iowa 2005), with *Bower, supra* note 2, and *Minkler v. Safeco Ins. Co. of America*, 49 Cal. 4th 315, 232 P.3d 612, 110 Cal. Rptr. 3d 612 (2010).

[14] Compare, e.g., 3 Allan D. Windt, Insurance Claims & Disputes: Representation of Insurance Companies and Insureds § 11.8 (6th ed. 2013); 3 New Appleman Law of Liability Insurance § 20.02[7][c] (rev. ed. 2013); Hazel Glenn Beh, *Tort Liability for Intentional Acts of Family Members: Will Your Insurer Stand by You?*, 68 Tenn. L. Rev. 1 (2000).

[15] See, e.g., *Holcim (US), supra* note 12.

[16] *Bower, supra* note 2, 752 F. Supp. 2d at 971.

[17] See, e.g., *Minkler, supra* note 13.

[18] *Corrigan, supra* note 13.

[19] *Id.* at 110.

As to the claims against Harold, the trial court disagreed and concluded that the various exclusions did not apply to Harold, because the Corrigans "'[did] not seek to hold Harold vicariously liable for Mark's actions, but assert[ed] separate claims against Harold for negligence.'"[20]

On appeal, the Iowa Supreme Court focused solely on the policy's criminal acts exclusion (finding it dispositive), and reversed. That exclusion stated that the insurer would not "'cover bodily injury or property damages arising out of . . . violation of any criminal law for which any insured is convicted.'"[21] The court concluded that the exclusion's plain language barred coverage not only for Mark, but also for Harold. And the court rejected the Corrigans' argument that the policy's severability clause, which stated that the insurance "'applie[d] separately to each insured,'" mandated a different result.[22]

The court acknowledged that it had held differently in a prior case involving a severability clause, but noted that that case involved an exclusion referencing "the insured" rather than "any insured." The court explained that "[the insurer's] use of the term 'any insured' in its criminal acts exclusion unambiguously convey[ed] an intent to exclude coverage when recovery is sought for bodily injury proximately caused by the criminal act of *any* insured."[23] Although the Corrigans suggested that the severability clause required that Harold be viewed as the sole insured under the policy, the court concluded that such an interpretation was unreasonable "[b]ecause the language of the exclusion clearly contemplate[d] its applicability to multiple insureds under the policy . . . ."[24] And the court concluded that to interpret the policy as the Corrigans suggested "would require [the] court to conclude the term 'the insured' mean[t] the same as 'any insured,'" a conclusion it had rejected in the

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[20] *Id.* at 111.

[21] *Id.* at 112.

[22] See *id.*

[23] *Id.* at 116 (emphasis in original).

[24] *Id.*

past.[25] Because such an interpretation was unreasonable, the court concluded that the severability clause did not render the exclusion ambiguous and that the exclusion's plain language excluded Harold from coverage under the policy.[26]

A good example of the rationale behind the minority position is *American Family Mut. Ins. Co. v. Bower*.[27] In that case, Jonathan Bower sexually molested a minor. The minor sued Bower and, as relevant here, also sued Bower's parents for their alleged negligence in Bower's assaults. Bower's parents sought coverage under their homeowners' insurance liability policies. Their insurer then sought declaratory judgment that its policies (by way of multiple exclusions from coverage) did not cover the claims against Bower's parents. As here, the policies contained certain exclusions referencing "any insured" and also contained a severability clause stating that "'this insurance applies separately to each insured.'"[28]

The federal district court concluded that those exclusions did not bar coverage for Bower's parents. Regarding the insurer's argument that the severability clause had no effect on the unambiguous exclusions referencing "any insured," the court disagreed. The court concluded that "adopting [the insurer's] reasoning . . . would make the severability provision superfluous."[29] The court then reasoned:

> [A] reasonable insured would believe from the severability provision that [his or her] insurance coverage and any exclusion of coverage would be judged on the basis of [the insured's] particular conduct and acts within [his or her] control. To then exclude coverage on the basis of another insured's conduct creates a conflict between the two provisions and denies the reasonable insured the coverage protection which the severability provision affords.[30]

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[25] *Id.*

[26] See *Corrigan*, *supra* note 13.

[27] *Bower*, *supra* note 2.

[28] See *id.* at 962.

[29] *Id.* at 970.

[30] *Id.* at 971.

As such, the court held that the severability clause required the exclusions to be applied to each insured based on each insured's own conduct.[31]

Summed up, the majority position emphasizes the plain meaning of the "an insured" or "any insured" language in a particular exclusion.[32] It emphasizes that the severability clause's command to apply the insurance separately to each insured does not change the exclusion's plain language or create ambiguity in its application.[33] The minority position, on the other hand, concludes that the severability clause's command to apply the insurance separately to each insured requires that each insured's conduct be analyzed as if he or she were the only insured under the policy.[34] Or, at the very least, such an interpretation is a reasonable one, making the policy ambiguous, which a court must construe in favor of coverage.[35]

We find the majority position more persuasive and adopt it here. It is consistent with our oft-stated approach to give language in an insurance contract its plain meaning.[36] We have in the past concluded that the "an insured" language, and implicitly the "any insured" language, is clear and unambiguous.[37] Such language means what it says, and the severability clause does not operate to override this clear and unambiguous language.[38] In other words, applying the insurance separately to each insured, as the severability clause requires, does not change that the exclusions reference "an insured" or "any insured." As one appellate court explained,

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[31] See *Bower, supra* note 2.

[32] See, e.g., *Corrigan, supra* note 13.

[33] See, e.g., *Holcim (US), supra* note 12; *Chacon, supra* note 2.

[34] See, e.g., *Bower, supra* note 2.

[35] See, e.g., *Minkler, supra* note 13; *Premier Ins. Co. v. Adams*, 632 So. 2d 1054 (Fl. App. 1994).

[36] See *Federated Serv. Ins. Co., supra* note 3.

[37] See *Volquardson, supra* note 1.

[38] See, *Corrigan, supra* note 13; *T.B. ex rel. Bruce v. Dobson*, 868 N.E.2d 831 (Ind. App. 2007); *Argent v. Brady*, 386 N.J. Super. 343, 901 A.2d 419 (2006); *Caroff, supra* note 2.

"The act of applying the policy separately to each insured does not alter or create ambiguity in the substance or sweep of the exclusion."[39]

[6] Our goal in interpreting insurance policy language is to give effect to each provision of the contract.[40] Adopting the minority position would render the "an" or "any" language superfluous, while adopting the majority position would not.[41] Further, we do not agree with the McCrarys' argument that the majority position renders the severability clause meaningless. First, the severability clause affects the interpretation of exclusions referencing "the insured."[42] There are such exclusions in these policies, such as the "Illegal Consumption of Alcohol" exclusion. And second, as American Family explained at oral argument, the severability clause still has application outside of its role in interpreting the scope of exclusions.[43]

Here, the exclusions (generally speaking) bar coverage for injuries intentionally caused by "any insured" and injuries resulting from sexual abuse by "an insured" or "any insured." The meaning of that language is plain. We hold that a severability clause stating that the insurance "applies separately to each insured" does not change that language, its meaning, or its application. We agree with the district court that the policies excluded Rick from coverage for injuries resulting from the alleged intentional sexual abuse of C.M. committed by Ryan (an "insured" under the policies). We conclude that the McCrarys' first two assigned errors lack merit. As for the third, in which the McCrarys ask for attorney fees, we note that such fees are not warranted because judgment for American Family is proper.[44]

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[39] *SECURA Supreme Insurance Company v. M.S.M.*, 755 N.W.2d 320, 329 (Minn. App. 2008).

[40] See *Guerrier*, *supra* note 6.

[41] See, *Adams*, *supra* note 35; *Worcester Mutual Ins. Co. v. Marnell*, 398 Mass. 240, 496 N.E.2d 158 (1986).

[42] See *Holcim (US)*, *supra* note 12.

[43] See 3 Windt, *supra* note 14.

[44] See Neb. Rev. Stat. § 44-359 (Reissue 2010). See, also, *American Family Ins. Group v. Hemenway*, 254 Neb. 134, 575 N.W.2d 143 (1998).

We briefly note Rick argues on cross-appeal that the district court lacked personal jurisdiction over Ryan and that, so, any rulings as to Ryan were void.[45] All the parties agree on this point, as do we, though it seems to us that the court's observations as to Ryan were simply incidental to determining whether Rick was covered under the policy. But to the extent the court's order makes rulings as to Ryan, such rulings are ineffectual.

CONCLUSION

We conclude that the severability clause does not affect the unambiguous language of the policies' exclusions, which bar coverage for Rick.

AFFIRMED.

WRIGHT, J., not participating.

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[45] See, *Johnson v. Johnson*, 282 Neb. 42, 803 N.W.2d 420 (2011); *In re Interest of William G.*, 256 Neb. 788, 592 N.W.2d 499 (1999).

CARLA McKINNEY, APPELLANT, V. MATTHIAS I. OKOYE AND NEBRASKA FORENSIC MEDICAL SERVICES, P.C., APPELLEES.

842 N.W.2d 581

Filed January 31, 2014. No. S-13-155.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.
2. **Actions: Proof.** In a malicious prosecution case, the conjunctive elements for the plaintiff to establish are (1) the commencement or prosecution of the proceeding against the plaintiff, (2) its legal causation by the present defendant, (3) its bona fide termination in favor of the plaintiff, (4) the absence of probable cause for such proceeding, (5) the presence of malice therein, and (6) damages.
3. **Actions: Public Officers and Employees: Liability.** A person who supplies information to prosecuting authorities is not liable for the prosecutors' action so long as any ensuing prosecution is left entirely to the officials' discretion.
4. **Actions: Public Officers and Employees.** A prosecution is not considered the result of the prosecuting authorities' independent discretion if the informant either (1) directs or counsels officials in such a way so as to actively persuade

and induce the officers' decision or (2) knows that the information provided is false or misleading.

5. ____: ____. A person who knowingly provides false or misleading information to a public officer may be liable for malicious prosecution even if that person brought no pressure to bear on the public officer and left the decision to prosecute entirely in the hands of that public officer.
6. **Negligence: Expert Witnesses: Testimony: Intent.** Expert testimony may establish a professional's conduct was so far afield of accepted professional standards or so divergent from the conduct of any minimally competent professional that it is reasonable to infer a knowing or intentional state of mind.
7. **Intent: Proof.** State of mind is difficult to prove, and rarely will the plaintiff be able to provide a "smoking gun."
8. **Summary Judgment: Intent.** Cases where the underlying issue is one of motive or intent are particularly inappropriate for summary judgment.
9. **Actions: Intent: Proof.** Legal causation in a malicious prosecution action is demonstrated when but for the false or misleading information, the decision to prosecute would not have been made.
10. **Probable Cause: Proof.** If there is insufficient undisputed evidence to show probable cause as a matter of law, the question of probable cause is a mixed question of fact and law.
11. **Actions: Probable Cause.** The element of probable cause in a malicious prosecution action is evaluated from the perspective of the defendant in the action who is allegedly legally responsible to the plaintiff for the prosecution, not from the perspective of the nonparty prosecuting officials.
12. **Criminal Law: Probable Cause.** The question of probable cause is whether a person in the defendant's position had reasonable grounds to suspect, based on the facts known or reasonably believed by the defendant at the time, that the crime prosecuted had been committed.
13. **Probable Cause.** Probable cause does not depend upon mere belief, however sincerely entertained; because if that were so, any citizen would be liable to arrest and imprisonment, without redress, whenever any person, prompted by malice, saw fit to swear that he believed the accused was guilty of the offense charged.
14. **Criminal Law: Probable Cause.** No probable cause exists if a defendant knew that the facts stated to prosecuting authorities supporting the suspicions of a crime were false or misleading.
15. **Intent: Words and Phrases.** Malice does not refer to mean or evil intent, as a layman might ordinarily think.
16. **Intent.** The lack of any personal ill will does not necessarily negate the existence of malice.
17. **Actions: Intent: Words and Phrases.** Malice, in the context of a malicious prosecution action, is any purpose other than that of bringing an offender to justice.
18. **Public Officers and Employees: Evidence.** Knowingly providing false or misleading information to prosecuting authorities may support the inference of malice.

Appeal from the District Court for Lancaster County: Paul D. Merritt, Jr., Judge. Reversed.

George H. Moyer, of Moyer & Moyer, for appellant.

James A. Snowden and Nathan D. Anderson, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellees.

Wright, Connolly, McCormack, and Miller-Lerman, JJ., and Pirtle, Judge.

McCormack, J.

NATURE OF CASE

A daycare provider brought a malicious prosecution action against the pathologist whose autopsy report was used to charge her with felony child abuse resulting in death. The charge was eventually dropped after two forensic pathologists retained by the daycare provider concluded the cause of death of the infant under her care was sudden infant death syndrome (SIDS). The district court granted summary judgment in favor of the pathologist on the malicious prosecution claim. We must determine whether the inference that the pathologist knowingly provided false or misleading information to law enforcement can reasonably be drawn from expert testimony that the pathologist's autopsy report was false and was "shockingly" unscientific.

BACKGROUND

Carla McKinney had been providing licensed daycare out of her home for almost 21 years without incident. In 2007, McKinney started caring for a 6-week-old infant boy. Two months later, the infant died in McKinney's care.

Investigation of Infant's Death

McKinney explained to the police that after feeding the infant, she laid him down for a nap. When McKinney went to wake the infant, he was not breathing. McKinney was unsuccessful in her attempts to revive the infant with cardiopulmonary resuscitation. Although McKinney first told police that the infant remained sleeping on his back until she found

him not breathing, she later explained that she had turned the infant onto his stomach when he had fussed before falling asleep.

Pathologist Dr. Matthias I. Okoye, pursuant to his duties under a contract with Lancaster County, conducted an autopsy on the infant. Okoye's report determined that the cause of death was homicide through blunt force trauma to the head (associated with closed head injury) and asphyxiation. As evidence of blunt force trauma to the head, the report listed two areas of acute subarachnoid hemorrhage, three areas of acute subdural hemorrhage, acute epidural and intraspinal hemorrhage, diffuse acute cerebral edema, a faint contusion on the head, and a recent contusion on the upper lip. Okoye listed 11 distinct clinical findings supporting asphyxia, which we will not list here. The report also listed six "faint red contusions" on the trunk and extremities of the body, as evidence of minor blunt force trauma to the body. In making the autopsy report, Okoye relied on his clinical observations during the autopsy, laboratory tests, reports by the police of McKinney's description of events, and a computed tomography (CT) whole body scan that Okoye had ordered.

During questioning, police investigators told McKinney that the pathologist's provisional report demonstrated the infant had died from a blunt trauma to the head while in her care and that she needed to provide an explanation. The transcription of the police interviews reflects that McKinney eventually said that after lifting the infant from an "Exersaucer" and while in the process of laying him on his side against a "boppy" pillow on the floor, her hand slipped and his head may have hit the floor from a couple inches of height.

McKinney Charged With Felony Child Abuse

McKinney was charged with felony child abuse resulting in death. One of the prosecuting attorneys explained that the Lancaster County Attorney's office did not decide to file the charge based on Okoye's autopsy report alone. She averred that the decision was also based upon the CT scan, McKinney's allegedly inconsistent accounts to the police of events the day

the infant died, and McKinney's perceived admissions during questioning that she caused the infant to hit his head either while being placed on "a 'boppy pillow'" or when she dropped the infant to the floor from waist height after picking him out of "an exercise saucer."

Charges Are Dropped, and McKinney Sues Appellees

McKinney's counsel agreed to waive the probable cause hearing in exchange for prompt delivery of police reports. The district court issued an "Order of Probable Cause Finding" without a hearing. Approximately 1 year later, the Lancaster County Attorney's office dropped the charges. McKinney alleges that this occurred after pathologists retained by McKinney found that the infant had died of SIDS and that there was no evidence supporting any traumatic injury.

McKinney sued Okoye and his wholly owned corporation, Nebraska Forensic Medical Services, P.C. (collectively appellees), for malicious prosecution stemming from Okoye's autopsy report. After appellees' motion to dismiss based on absolute privilege was unsuccessful,[1] appellees moved for summary judgment.

Expert Testimony Submitted at Summary Judgment Hearing

At the hearing on appellees' motion for summary judgment, differing expert testimony was presented on the correctness of the autopsy report and the soundness of Okoye's methodology. Okoye generally defended his findings, conclusions, and methods. Appellees' expert witness, a forensic pathologist, also generally defended the autopsy report, except that he found Okoye's diagnosis of asphyxia to be a "diagnosis with no physical evidence offered other than the very non-specific and ubiquitous findings." Forensic pathologists provided by McKinney, Drs. Janice Ophoven and Robert Bux, found the autopsy report "shockingly" baseless in its every detail. Ophoven and Bux opined that the infant died of SIDS.

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[1] See *McKinney v. Okoye*, 282 Neb. 880, 806 N.W.2d 571 (2011).

Ophoven Deposition

In her deposition, Ophoven addressed Okoye's autopsy report finding by finding. Ophoven had reviewed all the evidence relied on by Okoye, as well as numerous photographs taken by Okoye and law enforcement before, during, and after the autopsy. She stated she was generally "shocked" that Okoye had concluded there was any evidence of traumatic injury. Ophoven stated that much of the supposed evidence of injury had been created by Okoye during the autopsy.

First, Ophoven opined that what Okoye had described as subarachnoid hemorrhages were nothing more than "artifact[s]" created by Okoye during the autopsy process. Ophoven indicated that an artifact is something that is produced by the autopsy technique and, therefore, is not a legitimate autopsy finding. Okoye had circled those areas in two photographs of the brain. Ophoven found Okoye's characterization of those areas as hemorrhaging to be a "significant . . . deviation from good scientific diagnosis."

Ophoven explained that what was demonstrated by one of the photographs was simply "a little bit of blood on the surface of this brain" due to post mortem bleeding after disruptions that are caused when the skullcap is sawed and pulled off during the autopsy. Ophoven explained that with a true hemorrhage, "you see it pooling in the valleys; you see it come up over the hills, and you see it with sufficient — in a typical pattern that would suggest that a pathological process was present, and that is clearly not the case here."

In the other photograph purporting to show subarachnoid hemorrhaging, Ophoven opined, "again, it would be one of those things where you would never conclude that this is hemorrhage." The hemorrhaging was clearly blood vessels that were disrupted in the process of manually pulling the brain out of the head cavity. She stated that the two areas of "hemorrhaging" roughly corresponded to two equidistant areas on either side of the brain where the hands would be placed while extracting it.

Ophoven opined that Okoye had similarly inaccurately characterized three separate locations of "[a]cute subdural hemorrhage." Ophoven noted that photographs showing some

pooling of cerebrospinal fluid were apparently what Okoye was referring to, "since this is the only thing in the head where there's any blood-colored material." Ophoven explained that "this is what you see in every brain when you take [it] out" and that "[w]hen you're messing with the brain, there's an expected amount of cerebrospinal fluid inside the head. And it will pool, along with some of the blood that you're disrupting . . . when you're handling the brain and cutting into the skull." Ophoven stated that she could clearly recognize the fluid as cerebrospinal fluid because of its translucency. Ophoven said, "[I]t's so basic that it is frightening that this was mistaken for subdural blood."

Ophoven opined that the finding of epidural and intraspinal hemorrhaging was likewise baseless. She explained, "[I]t is well-recognized that this is a postmortem artifact that is not considered a legitimate finding. There's lots of literature. . . . And he has misinterpreted this as a pathological finding when, in fact, this is a routine and expected finding in infant autopsies."

The listed "[a]cute subgaleal hemorrhage" was the only area where Ophoven agreed with Okoye that there was "a real piece of blood." Nevertheless, Ophoven explained that the scar tissue and inflammation clearly visible under a microscope indicated it was an old injury. Moreover, the injury was clearly limited to the space between the skull and the scalp; there was no evidence of injury to the brain. Ophoven described the old blood as representing nothing more than a "bump" or something left over from the birthing process.

As for Okoye's listed finding of "[d]iffuse acute cerebral edema," Ophoven testified that the pictures of the brain showed it was "not edematous at all." The "gyri" and "sulci," which Ophoven described as hills and valleys of the brain surface, were normal and well defined. Ophoven explained that with a swollen brain, the valleys are closed and the hills touch each other. She also noted that the CT scan showed no edema.

Ophoven opined that the "[r]ecent focal red abraded contusion" of the "mid upper lip," which was listed by Okoye as evidence of both blunt force trauma to the head and asphyxia,

was "nothing . . . this looks like every baby mouth." Ophoven explained there was no purple contusion, no disruption of the tissue, and no blood. She believed that any color showing in the photograph was a result of Okoye's pulling on the infant's mouth. She stated that in another photograph, the infant's "little lip is just perfectly normal pink there when it's not being pulled up like that."

Ophoven found the remaining listed contusions entirely insignificant. They were not the right pattern, color, or distribution to be indicative of child abuse. She stated that they appeared to be livor mortis. But if they were injuries, they were old injuries. Ophoven stated further that if these areas were of any concern, they should have been examined under a microscope to confirm they were injuries and whether they were fresh. This apparently was not done. Ophoven stated that the "[f]aint red contusion" of the posterior scalp area likewise looked like livor mortis and that no section was taken from it to confirm differently.

Ophoven was "at a loss to understand why asphyxia was added to the list of cause[s] of death." She found all the listed clinical findings in the autopsy report in support of this conclusion to be either autopsy artifact or otherwise unsupportive of asphyxia.

Ophoven was especially perplexed by the conclusion of asphyxia given Okoye's finding of brain edema. Ophoven said that brain edema is fundamentally inconsistent with the pathophysiology of asphyxia. A person who is suffocated, even slowly, does not have time for his or her brain to swell. Ophoven stated that Okoye's inconsistent findings and conclusions were thus "shocking and unscientific" and "not only are there highly irregular findings in this autopsy, the conclusions make no sense."

Ophoven found that Okoye's conclusion of asphyxia was inconsistent with clear evidence that there was "white purge" from the infant's lungs. Ophoven described white purge as the "mechanical antithesis to the idea of suffocation." Ophoven explained that an infant who is suffocated, especially a 4-month-old infant, would struggle and that some blood would

enter the lungs through the nose or mouth. The white purge indicated this did not occur.

In addition to concluding that Okoye's findings and conclusions were baseless, Ophoven generally disapproved of Okoye's methodology. She noted that Okoye handled and sampled the fresh brain before fixing it in formalin. Pictures showed that Okoye had placed the fresh brain on a table, allowing it to deform under its own weight. Okoye took samples for analysis by slicing through the fresh brain, which Ophoven described as a "giant no-no." Cutting into a fresh brain, with its different tissues of varying consistencies, "wrecks it."

Ophoven generally did not consider a CT scan to be a useful tool in diagnosing brain injury. And regardless, she found nothing in the CT scan of the infant indicative of homicide or child abuse. She stated that the radiologist who wrote the CT scan report did not purport to state a cause of death and that the scan found no fractures or evidence of any swelling in the brain. The scan found a "depression of the occipital bone" on the right side, which Ophoven described as "nothing . . . a little divot . . . no big deal." The CT scan also listed a subdural hemorrhage. Ophoven said it was not there and was not confirmed in the autopsy. Ophoven indicated that a pathologist should know how to utilize radiology reports and what weight to put on certain findings. Overall, the CT scan was "a nonhelpful study that turned out to not show anything that was important at the postmortem."

Ophoven summarized that in her 30 years of experience, this was one of the worst autopsy reports she had ever seen. She was "absolutely shocked that these [findings] were described as traumatic injuries." Ophoven said that Okoye's report reflected that "you could then make every [SIDS] case a homicide." In every case of SIDS, if one connected "every dot and every little curlicue and every little artifact and strung it together, [one] could leave the impression to any reasonable person that harm had taken place." And "if I were law enforcement and I [received] a report such as this[, I] would have been forced to investigate this case as a homicide."

Bux Affidavit

Bux generally agreed with Ophoven's assessment of Okoye's report. Bux stated that Okoye's method of examining the infant's brain by cutting out sections before removing it from the cranial cavity was not practiced by "any other pathologist in the western hemisphere." He explained that it was a bad practice because of "the inherent friability of the infant brain, the tendency to introduce artifact and the inability to obtain good tissue sections for microscopic examination." Bux found Okoye's methodology "bizarre," "shocking, disturbing and perplexing." Bux also explained that "CT scans are notoriously inaccurate in determining head trauma."

Bux concluded that there was "no evidence to support blunt trauma to the head after a careful distinction is made between autopsy artifact and antemortem trauma." Furthermore, the diagnosis of asphyxia appeared to Bux to be something Okoye was "throwing . . . in as a second way to establish a traumatic cause of death if the first cause is rejected by the trier of fact. There is no objective evidence in Dr. Okoye's autopsy report to support this diagnosis."

Bux clarified that his position on Okoye's work was not a "mere difference of professional opinion." To the contrary, he was "embarrassed as a fellow professional at the conduct of Dr. Okoye and the findings he made." Bux concluded: "If Dr. Okoye has the training and experience he claims, he could not make as many errors as he made unless there was some ulterior motive or a reckless disregard for the integrity of the judicial process."

Summary Judgment in Favor of Appellees

The district court granted summary judgment in favor of appellees, concluding that there was no material issue as to several necessary elements of a malicious prosecution claim.

First, the court concluded that there was no material issue of fact on the required element that Okoye was responsible for the commencement of the prosecution. The court found as a matter of law that "no evidence has been presented from which reasonable minds could conclude that Dr. Okoye knowingly

provided [the county attorney's office] with false or misleading information with the intent to persuade or induce her to file the criminal charge against . . . McKinney."

Second, the court concluded as a matter of law that sufficient probable cause existed to warrant the filing of the charge against McKinney. In reaching this conclusion, the court examined all the information available to the county attorney's office, not just what was known by Okoye. The court did not consider appellees' argument that McKinney's waiver of the preliminary hearing amounted to a prima facie showing of probable cause.

Third, the court found that reasonable minds could not conclude that Okoye acted with malice when he prepared the autopsy reports. Similarly to the court's first finding, the court said that reasonable minds could not conclude that Okoye acted intentionally or with reckless disregard for the consequences.

McKinney appeals the order of summary judgment, which resulted in the dismissal of her malicious prosecution claim.

ASSIGNMENT OF ERROR

McKinney assigns, summarized, that the district court erred in concluding that there was no material issue of fact pertaining to her malicious prosecution claim.

STANDARD OF REVIEW

[1] In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.[2]

ANALYSIS

[2] In a malicious prosecution case, the conjunctive elements for the plaintiff to establish are (1) the commencement or prosecution of the proceeding against the plaintiff, (2) its legal causation by the present defendant, (3) its bona fide termination in favor of the plaintiff, (4) the absence of probable

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[2] *Guinn v. Murray*, 286 Neb. 584, 837 N.W.2d 805 (2013).

cause for such proceeding, (5) the presence of malice therein, and (6) damages.[3] The parties do not dispute that the county attorney's dismissal of the charges constituted a bona fide termination of the prosecution in favor of McKinney. And they agree there is a material issue of fact on damages. We address whether reasonable minds could differ as to the remaining elements of a malicious prosecution claim. In doing so, we must read the testimony of Ophoven and Bux in the light most favorable to McKinney, and we must give McKinney all reasonable inferences deducible from this evidence.[4]

Legally Responsible for Prosecution

[3,4] We first consider elements (1) and (2): whether Okoye was legally responsible for the commencement of the prosecution against McKinney. The charges against McKinney were initiated by the Lancaster County Attorney's office. A person who supplies information to prosecuting authorities is not liable for the prosecutors' action so long as any ensuing prosecution is left entirely to the officials' discretion.[5] "The exercise of the officer's discretion makes the initiation of the prosecution his [or her] own and protects from liability the person whose information or accusation has led the officer to initiate the proceedings."[6] But, a prosecution is not considered the result of the prosecuting authorities' independent discretion if the informant either (1) directs or counsels officials in such a way so as to actively persuade and induce the officers' decision or (2) knows that the information provided is false or misleading.[7]

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[3] See, *McKinney v. Okoye*, *supra* note 1; *Johnson v. First Nat. Bank & Trust Co.*, 207 Neb. 521, 300 N.W.2d 10 (1980).

[4] See *Guinn v. Murray*, *supra* note 2.

[5] *Schmidt v. Richman Gordman, Inc.*, 191 Neb. 345, 215 N.W.2d 105 (1974). See, also, e.g., Restatement (Second) of Torts § 653, comment *g*. (1977).

[6] Restatement, *supra* note 5 at 409.

[7] See, *Schmidt v. Richman Gordman, Inc.*, *supra* note 5; Restatement, *supra* note 5.

We agree with the district court that there was no issue of fact concerning whether Okoye actively persuaded the county attorney's office to file charges. One of the prosecuting attorneys in the underlying criminal action against McKinney averred: "While I considered Dr. Okoye's report in making my decision to file the Information, Dr. Okoye did not at any time attempt to actively persuade or induce me to pursue prosecution of . . . McKinney." Okoye likewise averred that he did not attempt to persuade law enforcement personnel or the county attorney's office to charge a crime.

Nothing in the record supports a contrary inference. It appears undisputed that the tenor of the communications between Okoye and the county attorney's office was no different than in any other case for which Okoye relayed his autopsy results. We decline McKinney's invitation to expand the meaning of "actively persuade or induce" to encompass the simple knowledge that an autopsy report plays an important role in a county attorney's decision to prosecute.

[5] However, we find the evidence presented at the summary judgment hearing was sufficient to demonstrate a material issue as to whether Okoye knowingly provided false or misleading information in his autopsy report. A person who knowingly provides false or misleading information to a public officer may be liable for malicious prosecution "even if that person brought no pressure to bear on the public officer and left the decision to prosecute entirely in the hands of that public officer."[8]

The governing standard of review for an order of summary judgment should be, and continues to be, one favorable to the nonmoving party,[9] giving that party the benefit of all reasonable inferences deducible from the evidence.[10] Conclusions based upon guess, speculation, or conjecture do not create

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[8] 52 Am. Jur. 2d *Malicious Prosecution* § 24 at 210 (2011). See, also, e.g., *Bhatia v. Debek*, 287 Conn. 397, 948 A.2d 1009 (2008).

[9] *Controlled Environ. Constr. v. Key Indus. Refrig.*, 266 Neb. 927, 670 N.W.2d 771 (2003).

[10] *Guinn v. Murray, supra* note 2.

material issues of fact for purposes of summary judgment.[11] But where reasonable minds could differ as to whether an inference supporting the ultimate conclusion can be drawn, summary judgment should not be granted.[12] We disagree with appellees' argument that it would be mere speculation and conjecture to conclude, from the most favorable view of the evidence presented at the summary judgment hearing, that Okoye knowingly presented false or misleading information to the county attorney's office.

[6] It may be speculative to infer an intentional or knowing state of mind from nothing more than evidence of simple negligence. But McKinney presented evidence that Okoye acted far afield of mere negligence. Other courts have explained that in a variety of contexts, expert testimony may establish a professional's conduct was "'so far afield of accepted professional standards'" or so divergent from the conduct of any "'minimally competent professional'" that it is reasonable to infer a knowing or intentional state of mind.[13] We agree that when experts find statements by a professional in their field not only false or misleading, but grossly negligent, shocking, and generally inexplicable, then it may be reasonable to infer that the false or misleading statements were knowingly and intentionally made. A reasonable fact finder could infer that Okoye knew or should have known that the statements he made regarding his autopsy and the findings of said autopsy were false or misleading.

Ophoven and Bux testified that every single clinical finding listed by Okoye as supporting his conclusion of homicide was false or misleading, because it either did not exist or did not indicate trauma. Ophoven and Bux described how Okoye "shockingly" misrepresented as multiple traumatic injuries

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[11] See *Shipley v. Department of Roads*, 283 Neb. 832, 813 N.W.2d 455 (2012).

[12] *Farmington Woods Homeowners Assn. v. Wolf*, 284 Neb. 280, 817 N.W.2d 758 (2012).

[13] *Jimenez v. City of Chicago*, 732 F.3d 710, 722 (7th Cir. 2013). See, also, e.g., *Norfleet v. Webster*, 439 F.3d 392 (7th Cir. 2006); *Collignon v. Milwaukee County*, 163 F.3d 982 (7th Cir. 1998).

what were only "artifacts" that Okoye himself had created during the autopsy process. Ophoven and Bux were generally at a loss to explain how a trained pathologist could conclude that even one of these listed findings was evidence of traumatic injury. Ophoven and Bux described shocking and bizarre methodology.

The confluence of false or misleading findings and conclusions, each so far afield from the findings and conclusions of any minimally competent pathologist, could lead to a reasonable inference that they were more than mistakes and incompetence. The evidence of reckless disregard for established pathology procedures could lead to the inference that Okoye was unconcerned with establishing a truthful report. Viewing the evidence in a light most favorable to McKinney as the nonmoving party, we determine reasonable minds could differ as to whether Okoye knew that the findings and conclusions stated in the autopsy report were false or misleading.

[7,8] State of mind is difficult to prove, and rarely will the plaintiff be able to provide a "'smoking gun.'"[14] Thus, we have explained that cases where the underlying issue is one of motive or intent are particularly inappropriate for summary judgment.[15] The district court erred in determining Okoye's intent as a matter of law.

Appellees argue that even if there is a material issue of fact whether Okoye knowingly provided false or misleading information, he did not cause the prosecution. Appellees point out statements made by one of the prosecuting attorneys that she "did not rely on Dr. Okoye's autopsy report alone in making [her] decision to prosecute . . . McKinney."

[9] Such statements do not create even a prima facie case for summary judgment on the element of legal causation by the defendant. Legal causation is demonstrated when but for

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[14] See, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 324, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007); *U.S. v. Abu-Jihaad*, 630 F.3d 102 (2d Cir. 2010); *Jakimas v. Hoffmann-La Roche, Inc.*, 485 F.3d 770 (3d Cir. 2007); *Com. of Pa. v. Flaherty*, 983 F.2d 1267 (3d Cir. 1993); *Neiman v. Tri R Angus*, 274 Neb. 252, 739 N.W.2d 182 (2007).

[15] *Schatz v. Vidlak*, 229 Neb. 4, 424 N.W.2d 613 (1988).

the false or misleading information, the decision to prosecute would not have been made.[16] If the decision to prosecute would have been made with or without the false or misleading information, the defendant did not cause the prosecution by supplying false or misleading information.[17]

Although one of the prosecuting attorneys listed other considerations upon which she based her decision to prosecute, she did not state whether she would have prosecuted McKinney with or without Okoye's autopsy report. And regardless, a "'plaintiff is not required to present direct evidence such as testimony from a prosecutor to establish causation in a malicious prosecution claim.'"[18]

Proximate causation is generally a question for the jury, and only where but one inference can be drawn is it proper for the court to decide the issue.[19] Viewing the evidence at the summary judgment hearing in a light most favorable to McKinney, we determine reasonable minds could conclude that Okoye's false report legally caused the prosecution. We find appellees' argument to the contrary to be without merit.

Probable Cause

[10] We turn next to the element of probable cause. In an action for malicious prosecution, probable cause is a question of law for the court to determine where there is sufficient undisputed evidence to show probable cause.[20] However, it is for the jury to determine what facts are proved.[21] Thus, if there

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[16] See, *Matthews v BCBSM*, 456 Mich. 365, 572 N.W.2d 603 (1998); *Waldner v. Dow*, 128 Or. App. 197, 876 P.2d 785 (1994); *Danielson v. Hess*, 807 N.W.2d 113 (S.D. 2011); *Browning-Ferris Industries, Inc. v. Lieck*, 881 S.W.2d 288 (Tex. 1994); 52 Am. Jur. 2d, *supra* note 8.

[17] See, *Matthews v BCBSM*, *supra* note 16; *Danielson v. Hess*, *supra* note 16; *King v. Graham*, 126 S.W.3d 75 (Tex. 2003).

[18] *French v. French*, 385 S.W.3d 61, 71 (Tex. App. 2012).

[19] *Maloney v. Kaminski*, 220 Neb. 55, 368 N.W.2d 447 (1985).

[20] See, e.g., *Brumbaugh v. Frontier Refining Co.*, 173 Neb. 375, 113 N.W.2d 497 (1962); Restatement, *supra* note 5, § 673.

[21] *Turner v. O'Brien*, 5 Neb. 542, 1877 WL 4241 (1877).

is insufficient undisputed evidence to show probable cause as a matter of law, the question of probable cause is a mixed question of fact and law.[22]

[11] The district court erred by evaluating the element of probable cause from the perspective of the nonparty prosecuting authorities. The element of probable cause in a malicious prosecution action is evaluated from the perspective of the defendant in the action who is allegedly legally responsible to the plaintiff for the prosecution, not from the perspective of the nonparty prosecuting officials.[23] Thus, we have said that whether probable cause exists depends, not upon the actual facts of the case, but upon the question of whether the person making the claim had reasonable grounds to believe in its truth.[24] The person who knowingly provided false or misleading information becomes the "real prosecutor."[25]

[12,13] The question of probable cause is whether a person in the defendant's position had reasonable grounds to suspect, based on the facts known or reasonably believed by the defendant at the time, that the crime prosecuted had been committed.[26] "Probable cause does not depend upon mere belief, however sincerely entertained. Because if that were so, any citizen would be liable to arrest and imprisonment without redress, whenever any person, prompted by malice,

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[22] See *Giannamore v. Shevchuk*, 108 Conn. App. 303, 947 A.2d 1012 (2008).

[23] See, e.g., *Johnson v. First Nat. Bank & Trust Co.*, *supra* note 3; *Rose v. Reinhart*, 194 Neb. 478, 233 N.W.2d 302 (1975); *Cimino v. Rosen*, 193 Neb. 162, 225 N.W.2d 567 (1975); *Schmidt v. Richman Gordman, Inc.*, *supra* note 5; *Brumbaugh v. Frontier Refining Co.*, *supra* note 20; *Brewer v. Fischer*, 144 Neb. 712, 14 N.W.2d 315 (1944); *Kersenbrock v. Security State Bank*, 120 Neb. 561, 234 N.W. 419 (1931); *Turner v. O'Brien*, *supra* note 21. See, also, e.g., *Tomaskevitch v. Specialty Records Corp.*, 717 A.2d 30 (Pa. Commw. 1998).

[24] See *Turner v. O'Brien*, *supra* note 21.

[25] *Holmes v. Crossroads Joint Venture*, 262 Neb. 98, 117, 629 N.W.2d 511, 527 (2001).

[26] See, *Cimino v. Rosen*, *supra* note 23; *Jones v. Brockman*, 190 Neb. 15, 205 N.W.2d 657 (1973); *Brumbaugh v. Frontier Refining Co.*, *supra* note 20; Restatement, *supra* note 5, § 662.

saw fit to swear that he believed the accused was guilty of the offense charged."[27]

[14] Ophoven and Bux both opined that there was no reasonable basis for a pathologist in Okoye's position to believe that the cause of death was homicide. We have already discussed that there is a material issue of whether Okoye knowingly provided false or misleading information in his autopsy report. No probable cause exists if a defendant knew that the facts stated to prosecuting authorities supporting the suspicions of a crime were false or misleading.[28] Under such circumstances, the defendant's belief that the plaintiff committed a crime is not reasonable.[29] Insofar as there is conflicting expert testimony concerning what someone in Okoye's position would have reasonably believed and whether Okoye knew that the facts stated in his autopsy report were false or misleading, there is a dispute of fact on the element of probable cause precluding determination of this issue as a matter of law.

We find no merit to appellees' argument that McKinney's waiver of her preliminary hearing in the underlying criminal case established a prima facie case of probable cause as a matter of law. Leaving aside whether such a prima facie case could otherwise be made when the preliminary hearing was not actually conducted, there can be no prima facie case of probable cause if false or misleading statements or omissions were material to that finding.[30] Furthermore, even if such a prima facie case had been made, there is a material issue of fact that it was rebutted.

The district court erred in concluding that appellees had demonstrated there was no material issue of fact on the element of probable cause.

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[27] *Ross v. Langworthy*, 13 Neb. 492, 495, 14 N.W. 515, 517 (1882).

[28] See, e.g., *Horne v. J.H. Harvey Co.*, 274 Ga. App. 444, 617 S.E.2d 648 (2005).

[29] See *id.*

[30] See, *Hinchman v. Moore*, 312 F.3d 198 (6th Cir. 2002); *Darrah v. City of Oak Park*, 255 F.3d 301 (6th Cir. 2001); *Lay v. Pettengill*, 191 Vt. 141, 38 A.3d 1139 (2011).

MALICE

[15-17] We turn lastly to the element of malice. Malice does not refer to mean or evil intent, as a layman might ordinarily think.[31] Thus, the lack of any personal ill will does not necessarily negate the existence of malice.[32] Malice, in the context of a malicious prosecution action, is any purpose other than that of bringing an offender to justice.[33]

[18] Malice may be deduced from the surrounding facts and circumstances.[34] It may be inferred from the absence of probable cause, although malice and probable cause are not synonymous.[35] Wanton and reckless disregard for the rights of others may imply malice.[36] Knowingly providing false or misleading information to prosecuting authorities may support the inference of malice.[37]

Whether Okoye acted with malice is a question upon which reasonable minds could differ—in the same way reasonable minds could differ, based on the conflicting expert testimony, as to whether the autopsy report was false or misleading at all. As a procedural equivalent to a trial, a summary judgment is an extreme remedy.[38] And, like intent, malice is almost always a question for the trier of fact.[39] The district court erred in determining the element of malice as a matter of law.

CONCLUSION

Appellees failed to demonstrate they are entitled to summary judgment. Most important, differing reasonable inferences

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[31] *Strong v. Nicholson*, 580 So. 2d 1288 (Miss. 1991).

[32] 7 Am. Jur. Proof of Facts 2d 181 *Malicious Prosecution* § 11 (1975).

[33] See, *McKinney v. Okoye*, *supra* note 1; Restatement, *supra* note 5, § 668.

[34] See *Schmidt v. Richman Gordman, Inc.*, *supra* note 5.

[35] See *id.*

[36] *Johnson v. First Nat. Bank & Trust Co.*, *supra* note 3.

[37] See, *Sanders v. English*, 950 F.2d 1152 (5th Cir. 1992); *Horne v. J.H. Harvey Co.*, *supra* note 28; *Jenkins v. Baldwin*, 801 So. 2d 485 (La. App. 2001).

[38] See *Green v. Box Butte General Hosp.*, 284 Neb. 243, 818 N.W.2d 589 (2012).

[39] See 7 Am. Jur. Proof of Facts 2d, *supra* note 32.

could be drawn as to whether Okoye knowingly provided false or misleading information in his autopsy report. Because the elements of a malicious prosecution action are difficult to prove, "a plaintiff has a steep climb in prosecuting a malicious prosecution action."[40] Nevertheless, appellees have not demonstrated as a matter of law that McKinney will not make that climb.

We reverse the district court's order granting appellees summary judgment.

REVERSED.

HEAVICAN, C.J., and STEPHAN and CASSEL, JJ., not participating.

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[40] *McKinney v. Okoye, supra* note 1, 282 Neb. at 887, 806 N.W.2d at 578.

STATE OF NEBRASKA, APPELLEE, V.
CODY M. BRUCKNER, APPELLANT.
842 N.W.2d 597

Filed January 31, 2014. No. S-13-164.

1. **Collateral Estoppel: Appeal and Error.** The applicability of the doctrine of collateral estoppel constitutes a question of law. With regard to such a question, an appellate court is obligated to reach a conclusion independent from the lower court's conclusion.
2. **Collateral Estoppel: Words and Phrases.** "Collateral estoppel" means that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties or their privies in any future lawsuit.
3. **Collateral Estoppel.** There are four conditions that must exist for the doctrine of collateral estoppel to apply: (1) The identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or in privy with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.
4. **Constitutional Law: Collateral Estoppel: Double Jeopardy.** The doctrine of collateral estoppel is embodied in the 5th Amendment guarantee against double jeopardy and is applicable to the states through the 14th Amendment.
5. **Collateral Estoppel: Double Jeopardy.** The fact that collateral estoppel is embodied in double jeopardy does not mean that it is coextensive with the protections of double jeopardy.

6. **Collateral Estoppel: Prior Convictions: Sentences.** Collateral estoppel does not apply in the context of whether a defendant's prior conviction may be used for purposes of sentence enhancement.

Appeal from the District Court for Sarpy County: MAX KELCH, Judge. Affirmed.

John P. Grant, of Grant Law Offices, P.C., for appellant.

Jon Bruning, Attorney General, Erin E. Tangeman, George R. Love, and Joel R. Rische, Senior Certified Law Student, for appellee.

HEAVICAN, C.J., CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

STEPHAN, J.

Cody M. Bruckner appeals from an order finding him guilty of fourth-offense driving under the influence (DUI), a Class IIIA felony. The principal issue on appeal is whether the trial court erred in holding that the doctrine of collateral estoppel did not bar the use of two prior convictions for the purpose of sentence enhancement. Although our reasoning differs somewhat from that of the district court, we affirm.

BACKGROUND

As a result of an incident which occurred on July 6, 2012, Bruckner was charged with DUI. In the operative charging information, the State alleged that the DUI should be punished as a fourth offense because Bruckner had previously been convicted of DUI on April 17, 2003; October 15, 2001; and September 17, 1999.

Immediately after Bruckner pled guilty to the 2012 DUI charge, the court conducted a sentence enhancement hearing and received three exhibits offered by the State. Exhibit 1 was a certified copy of Bruckner's April 17, 2003, DUI conviction. The exhibit shows that Bruckner was charged on October 3, 2002, with third-offense DUI. The exhibit contains the charging information, which alleged two prior convictions as the basis for the third-offense charge: September 17, 1999, and

October 15, 2001. The exhibit shows that Bruckner pled no contest to the 2002 DUI charge and that a sentence enhancement hearing was held. No transcription of the sentencing hearing is included in the exhibit, but it demonstrates that two exhibits identified as "Exhibit[s] 2 & 3" were offered and received at the enhancement hearing. It further demonstrates that the court found Bruckner guilty of a first-offense DUI in 2003.

Exhibit 2 offered by the State is a certified record of Bruckner's September 17, 1999, conviction for DUI, and exhibit 3 offered by the State is a certified record of Bruckner's October 15, 2001, conviction for DUI. During the enhancement hearing in the instant case, Bruckner argued that the 1999 and 2001 convictions were the same convictions referred to in the record of the 2003 enhancement hearing and that because those convictions did not result in enhancement of the 2003 charge, the State was collaterally estopped from using them for enhancement of the 2012 charge. Noting that our decision in *State v. Gerdes*[1] "never directly determined" whether collateral estoppel applied in a sentence enhancement proceeding, the district court concluded that even if it did, the record was insufficient to apply the doctrine in this case. The court stated that without knowing the reason the 1999 and 2001 convictions were not used for enhancement of the 2003 offense, it could not conclude that there was a prior adjudication which would form the basis of collateral estoppel.

After he was sentenced for fourth-offense DUI, Bruckner perfected this timely appeal, which we moved to our docket on our motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[2]

ASSIGNMENT OF ERROR

Bruckner assigns that the district court erred in enhancing the sentence for his 2012 DUI conviction as a fourth offense.

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[1] *State v. Gerdes*, 233 Neb. 528, 446 N.W.2d 224 (1989).

[2] See, Neb. Rev. Stat. § 24-1106(3) (Reissue 2008); Neb. Ct. R. App. P. § 2-102(C) (rev. 2012).

STANDARD OF REVIEW

[1] The applicability of the doctrine of collateral estoppel constitutes a question of law.[3] With regard to such a question, an appellate court is obligated to reach a conclusion independent from the lower court's conclusion.[4]

ANALYSIS

[2,3] "Collateral estoppel" means that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties or their privies in any future lawsuit.[5] There are four conditions that must exist for the doctrine of collateral estoppel to apply: (1) The identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or in privy with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.[6] Bruckner contends that the issue of whether his 1999 and 2001 convictions could be used for enhancement was decided against the State in his 2003 case and that the State is therefore collaterally estopped from relitigating in this case whether those convictions can be used for enhancement.

A threshold issue of law is whether the doctrine of collateral estoppel applies to a sentence enhancement proceeding in a criminal case. As the district court noted, our jurisprudence on this point is not entirely clear. In *State v. Gerdes*,[7] a defendant convicted of DUI contended that collateral estoppel barred records of his two prior DUI convictions from being used for sentence enhancement purposes. After discussing the general parameters of collateral estoppel, we held that

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[3] *State v. McCarthy*, 284 Neb. 572, 822 N.W.2d 386 (2012).

[4] *Id.*

[5] *Id.*; *State v. Secret*, 246 Neb. 1002, 524 N.W.2d 551 (1994), *overruled in part on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

[6] *Id.*

[7] *State v. Gerdes*, *supra* note 1.

> [a] criminal defendant, relying on collateral estoppel in relation to constitutional protection against double jeopardy in a present proceeding, has the burden to prove that the particular issue which is sought to be relitigated, but which is constitutionally foreclosed by the double jeopardy clause, was necessarily or actually determined in a previously concluded criminal proceeding.[8]

We concluded that the defendant had not met this burden, because he did not prove that there had been prior adjudications of the specific issue of whether his prior convictions could be used for enhancement. While the applicability of collateral estoppel to enhancement proceedings may have been implicit in *Gerdes*, our opinion did not reach the issue directly. Citing *Gerdes*, the Nebraska Court of Appeals applied similar reasoning in *State v. Solomon*.[9]

Recently in *State v. McCarthy*,[10] we rejected a claim that collateral estoppel barred the use of two prior shoplifting convictions to enhance a subsequent offense. Because both of the prior convictions were treated as first offenses, the defendant argued that her conviction for third offense should have been treated as only a second offense. Rejecting this argument, we held that both prior convictions could be used for a third-offense enhancement, because the law did not require progressive convictions for first- and second-offense shoplifting in order to enhance a third conviction to a third offense. Our opinion in *McCarthy* did not address the broader question of whether collateral estoppel could ever apply in a sentence enhancement proceeding. We address that question now.

[4] The doctrine of collateral estoppel is embodied in the 5th Amendment guarantee against double jeopardy and is applicable to the states through the 14th Amendment.[11] We

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[8] *Id.* at 531, 446 N.W.2d at 227, citing *U.S. v. Ragins*, 840 F.2d 1184 (4th Cir. 1988). See, also, *U.S. v. Gentile*, 816 F.2d 1157 (7th Cir. 1987).

[9] *State v. Solomon*, 16 Neb. App. 368, 744 N.W.2d 475 (2008).

[10] *State v. McCarthy*, *supra* note 3.

[11] See *Ashe v. Swenson*, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970).

considered the interplay between double jeopardy and collateral estoppel in the criminal context in *State v. Young*.[12] In that case, a defendant was charged with DUI and, based on the same conduct, had his driver's license administratively revoked. At a hearing on the administrative revocation, he successfully persuaded the director of the Department of Motor Vehicles that he had not been operating his vehicle at the time he was intoxicated, and his license was restored. During his criminal trial for DUI, the defendant alleged the director's administrative finding that he had not been operating the vehicle while intoxicated collaterally estopped the State from attempting to prove otherwise. We rejected this argument, reasoning in part that administrative revocation proceedings do not involve punishment implicating double jeopardy principles, and that "[t]he absence of double jeopardy exposure forecloses the application of collateral estoppel against the State . . . ."[13]

Both the U.S. Supreme Court and this court have held that double jeopardy principles do not bar a retrial on a prior conviction allegation in the noncapital sentencing context where the initial evidence is found to be insufficient.[14] In *State v. Oceguera*,[15] we agreed that the State failed to present sufficient evidence of three valid prior DUI convictions to support a conviction for fourth offense, but we remanded for a new enhancement hearing after concluding that the failure of proof did not trigger double jeopardy protections.

[5] A literal application of the language we used in *Young* would lead to the conclusion that because double jeopardy does not bar retrial on the prior conviction allegations, neither does collateral estoppel. But our categorical statement in *Young* may have been imprecise. Most other state and federal courts hold that although collateral estoppel is embodied in the double jeopardy clause, it is actually a separate claim that mandates

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[12] *State v. Young*, 249 Neb. 539, 544 N.W.2d 808 (1996).

[13] *Id.* at 543, 544 N.W.2d at 812.

[14] *Monge v. California*, 524 U.S. 721, 118 S. Ct. 2246, 141 L. Ed. 2d 615 (1998); *State v. Oceguera*, 281 Neb. 717, 798 N.W.2d 392 (2011).

[15] *State v. Oceguera*, *supra* note 14.

a separate analysis, and applies in criminal proceedings independently of double jeopardy principles.[16] As the U.S. Court of Appeals for the Seventh Circuit explained in *U.S. v. Bailin*,[17] the fact that collateral estoppel is embodied in double jeopardy does not mean that it is coextensive with the protections of double jeopardy. Indeed, a "criminal defendant has no need for the benefits of [collateral estoppel] if his entire prosecution is barred by double jeopardy."[18] Thus, collateral estoppel can be applicable in criminal cases even when double jeopardy is not.[19] As the *Bailin* court noted, a better statement of the rule should be that collateral estoppel is a "'component'" of the double jeopardy clause.[20]

The question before us is whether collateral estoppel should apply in the context of a prior conviction sentencing enhancement proceeding despite the fact that double jeopardy does not. To answer that question, we look to other jurisdictions for guidance. Some jurisdictions have limited the application of collateral estoppel in criminal cases to prior determinations of fact which relate directly to criminal liability[21] or are essential to a claim or defense.[22] We note that, so limited, collateral estoppel would not apply to a sentence enhancement proceeding.

Other jurisdictions have identified specific public policy reasons why collateral estoppel should not apply in sentence enhancement proceedings. For example, in *People v. Barragan*,[23] the California Supreme Court considered an issue

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[16] See, *U.S. v. Hall*, 551 F.3d 257 (4th Cir. 2009); *U.S. v. Bailin*, 977 F.2d 270 (7th Cir. 1992); *People v. Barragan*, 32 Cal. 4th 236, 83 P.3d 480, 9 Cal. Rptr. 3d 76 (2004); *State v. Butler*, 505 N.W.2d 806 (Iowa 1993). See, also, 50 C.J.S. *Judgments* § 1217 (2009).

[17] *U.S. v. Bailin*, *supra* note 16.

[18] *Id.* at 275.

[19] *Id.*

[20] *Id.* at 276 n.8.

[21] *State v. Taylor*, 103 So. 3d 571 (La. App. 2012).

[22] *State v. Eggleston*, 164 Wash. 2d 61, 187 P.3d 233 (2008).

[23] *People v. Barragan*, *supra* note 16, 32 Cal. 4th at 239, 83 P.3d at 482, 9 Cal. Rptr. 3d at 79.

arising under California's "Three Strikes" law, which prescribes an increased punishment for a felony if the defendant has one or more prior qualifying felony convictions, known as strikes. A finding that the defendant had one "strike" was reversed on appeal for insufficient evidence, and the question was whether he could be retried on that issue. The court held that he could, rejecting the defendant's claim that retrial was barred under various theories, including collateral estoppel. The court determined that under California law, the initial determination was never final. And it specifically noted that even if the finality requirement were met, "'the public policies underlying collateral estoppel—preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation—strongly influence whether its application in a particular circumstance would be fair to the parties and constitutes sound judicial policy.'"[24]

The court in *Barragan* reasoned that permitting retrial on the issue of a prior conviction would not undermine the integrity of the judicial system, but applying collateral estoppel to prevent retrial of this issue would undermine public confidence in the ability of the system to apply statutes prescribing increased punishment for repeat offenders. The court concluded that allowing the State another opportunity to show the convictions is "'not unfair'" but will actually "'enhance the accuracy of the proceeding.'"[25] The court also noted that retrial would not subject the defendant to harassment, because the public had a legitimate interest in making sure defendants will not, "'through technical defects in . . . proof,'" escape statutorily prescribed increased punishments.[26]

Similarly, in *Williams v. New York*,[27] a court declined to apply collateral estoppel to bar use of prior convictions for

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[24] *Id.* at 256, 83 P.3d at 495, 9 Cal. Rptr. 3d at 93.

[25] *Id.* at 257, 83 P.3d at 495, 9 Cal. Rptr. 3d at 94, quoting *Caspari v. Bohlen*, 510 U.S. 383, 114 S. Ct. 948, 127 L. Ed. 2d 236 (1994).

[26] *Id.* at 257, 83 P.3d at 496, 9 Cal. Rptr. 3d at 95, quoting *People v. Morton*, 41 Cal. 2d 536, 261 P.2d 523 (1953).

[27] *Williams v. New York*, 367 F. Supp. 2d 449 (W.D.N.Y. 2005).

enhancement purposes. The court noted that collateral estoppel "'is less liberally applied in criminal cases than in civil actions, because "considerations peculiar to the criminal process may outweigh the need to avoid repetitive litigation."'"[28] The court reasoned that because criminal cases involve issues of public safety and the rights of individual defendants, "concern with reaching the correct result inevitably must outweigh the efficiency concerns that might otherwise favor application of the collateral estoppel doctrine."[29]

Although each of these cases involved factual contexts slightly different from the present case, we conclude that the public policy considerations they discuss are persuasive reasons not to apply collateral estoppel in the context of determining whether prior convictions can be used to enhance the classification of or sentence imposed on a subsequent conviction. Unlike many issues of fact in criminal cases, the existence of a prior conviction is usually not a matter of genuine dispute. As the U.S. Supreme Court has observed, "[p]ersistent-offender status is a fact objectively ascertainable on the basis of readily available evidence. Either a defendant has the requisite number of prior convictions, or he does not."[30]

[6] The fact that a prior conviction was not used for enhancement in a prior proceeding should not be a bar to its use in a subsequent enhancement proceeding if, as is the case here, the conviction fits within the statutory enhancement scheme. This is hardly unfair to the defendant who has already committed the crime and is on notice that the conviction may affect the severity of punishment for a subsequent offense. Application of the doctrine of collateral estoppel to produce a contrary result would undermine both the truth-seeking function of the criminal justice system and public confidence in the ability of courts to punish repeat offenders in the manner which the Legislature has prescribed. We therefore hold that collateral estoppel does not apply in the context of whether a

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[28] *Id.* at 458, quoting *Pinkney v. Keane*, 920 F.2d 1090 (2d Cir. 1990) (citing *People v. Plevy*, 52 N.Y.2d 58, 417 N.E.2d 518, 436 N.Y.S.2d 224 (1980)).

[29] *Williams v. New York*, *supra* note 27, 367 F. Supp. 2d at 458.

[30] *Caspari v. Bohlen*, *supra* note 25, 510 U.S. at 396.

defendant's prior conviction may be used for purposes of sentence enhancement.

Thus, although our reasoning differs somewhat from that of the district court, we agree with its conclusion that collateral estoppel did not bar the use of Bruckner's 1999 and 2001 DUI convictions as two of the three prior convictions necessary to enhance his 2012 conviction to fourth offense.

CONCLUSION

For the reasons discussed, we affirm the judgment of the district court.

AFFIRMED.

WRIGHT, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V.
JUAN E. CASTANEDA, APPELLANT.
842 N.W.2d 740

Filed February 7, 2014. No. S-11-023.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
2. **Judgments: Appeal and Error.** In making the determination as to factual questions, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.
3. **Trial: Judges: Evidence.** Trial judges are allowed to exclude evidence if its probative value is outweighed by unfair prejudice, confusion of the issues, or potential to mislead the jury.
4. **Criminal Law: Trial: Rules of Evidence: Polygraph Tests.** An evidentiary rule categorically excluding polygraph results is not arbitrary, because state and federal governments have broad latitude to establish rules excluding evidence from criminal trials.
5. **Trial: Juries: Witnesses: Testimony.** A fundamental principle of the justice system is that the jury is the lie detector, determining the weight and credibility of witness testimony.
6. **Polygraph Tests: Prejudicial Statements.** Polygraph results are generally inadmissible as unduly prejudicial.
7. **Rules of Evidence: Hearsay.** The foundation of trustworthiness required by the business records exception to the hearsay rule is sufficient to satisfy the authentication requirement of Neb. Evid. R. 901, Neb. Rev. Stat. § 27-901 (Reissue 2008).

8. **Trial: Evidence: Appeal and Error.** An appellate court reviews a trial court's ruling on authentication for an abuse of discretion.
9. **Trial: Rules of Evidence: Appeal and Error.** Under Neb. Evid. R. 103, Neb. Rev. Stat. § 27-103 (Reissue 2008), error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected and, in case the ruling is one excluding evidence, the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked.
10. **Constitutional Law: Appeal and Error.** The Nebraska Supreme Court ordinarily construes Nebraska's ex post facto clause to provide no greater protections than those guaranteed by the federal Constitution.
11. **Constitutional Law: Statutes: Sentences.** A law which purports to apply to events that occurred before the law's enactment, and which disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed, is an ex post facto law and will not be endorsed by the courts.
12. **Criminal Law: Statutes: Legislature: Sentences.** Where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Convictions affirmed, all sentences vacated, and cause remanded for resentencing.

Thomas C. Riley, Douglas County Public Defender, for appellant.

Jon Bruning, Attorney General, James D. Smith, and Stacy M. Foust for appellee.

Marsha Levick, Deputy Director and Chief Counsel, and Emily Keller and Lauren Fine for amicus curiae Juvenile Law Center.

Amy A. Miller, for amicus curiae American Civil Liberties Union Foundation of Nebraska.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

HEAVICAN, C.J.

I. INTRODUCTION

Juan E. Castaneda was convicted of several charges arising from three shootings that occurred in Omaha, Nebraska, on

November 12, 2008. We affirm Castaneda's convictions in all respects, but conclude that the sentences of life imprisonment without the possibility of parole imposed upon Castaneda were unconstitutional. Accordingly, we vacate those sentences and remand the cause for resentencing.

II. BACKGROUND

Castaneda was convicted by a jury of two counts of first degree felony murder, one count of attempted second degree murder, one count of attempted robbery, three counts of use of a deadly weapon to commit a felony, and one count of criminal conspiracy. He was sentenced to two terms of life imprisonment without the possibility of parole for first degree murder, 10 to 20 years in prison for attempted second degree murder, 10 to 15 years in prison for attempted robbery, 10 to 15 years in prison for criminal conspiracy, and 10 to 15 years in prison for each of the weapons convictions. At the time of the shootings, Castaneda was 15 years old.

1. Shootings

The victim of the first shooting was found at approximately 10:45 p.m. on November 12, 2008. Luis Silva, who lived on Dorcas Street in Omaha, was found outside his home by his cousin, Jose Hernandez. Hernandez testified that when he heard a car horn and other sounds, he went outside and saw Silva on the ground with two individuals standing over him. One of the individuals near Silva was holding a gun. He pointed the gun at Hernandez and, in Spanish, demanded money. Hernandez returned to the house, and the second individual said "let's go," in English.

Silva had been shot twice. One bullet grazed the left side of Silva's head, and the second entered his chest under his left arm. Silva was declared dead upon his arrival at an Omaha hospital.

Hernandez described the two assailants. One was wearing black pants and a gray, hooded sweatshirt, and the other wore black pants and a black, hooded sweatshirt with the hood pulled over his head. Hernandez identified both as appearing to be "Latin," but when counsel for the State asked Hernandez

about their ability to speak Spanish, he answered, "Not very well. Like they were born here."

Shortly before Silva was shot, two brothers, Mark and Charles McCormick, were visiting their cousin at his residence near 13th and Dorcas Streets. As the McCormicks were leaving the residence at about 10:30 p.m., two men, one holding a gun, approached and demanded money. Mark replied that he had no money, and when he and Charles threatened the two men with a "piece of wood" or "tree stump," the men started "backing away." Mark described the first man, who was holding the gun, as wearing a gray, hooded sweatshirt. The second man was wearing a dark-colored, hooded sweatshirt.

At approximately 11 p.m., Charles Denton and Hilary Nelsen drove to a walkup automatic teller machine (ATM) in the 50th Street and Underwood Avenue area, where Denton parked the vehicle and got out to use the ATM. Denton observed two men walking through the parking lot, and he thought they looked out of place. After Denton returned to the vehicle and started to drive away, the two men ran toward Denton's vehicle. One of the men approached the driver's-side window and demanded money. The man fired a gun at the vehicle, and the driver's-side window shattered. Denton drove away and called the 911 emergency dispatch service. When he was about 1 mile away, Denton stopped the vehicle because he realized he had been shot. Denton sustained a bullet wound through his bicep and a graze on his chest.

Nelsen testified that the men were wearing baggy jeans and hooded sweatshirts. Nelsen also testified that one of the sweatshirts was dark and one was white and that both men had the hoods pulled over their heads. Denton also said one sweatshirt was lighter and the other was darker. Nelsen said the men were young and were either "Mexican" or "African-American," but not white. Denton stated that although he did not get a good look at the men's faces, both were "Hispanic."

Shortly after 11 p.m., a passerby saw a car with its engine running and lights on in front of a gas station at 52d and Leavenworth Streets. The witness stopped because there were no lights on in the parking lot. The car door was open, and its interior lights were on. The witness saw a person lying on the

ground nearby and called 911. The victim was identified as Tari Glinsmann, who worked at the gas station and had just finished her shift. The car was a green Ford Taurus Glinsmann had borrowed from a friend that night. Glinsmann was dead when rescue workers arrived on the scene.

2. Cervantes' Version of Events

The State entered into an agreement with Edgar Cervantes to dismiss murder charges against him in exchange for his testimony. Cervantes testified that on November 12, 2008, he was living with Santiago Jacobo and his family. Cervantes agreed to transport Jacobo's children to and from school in exchange for the use of Jacobo's Chevrolet Cavalier.

According to Cervantes, he needed money so he called Eric Ramirez on November 12, 2008, and asked if Ramirez wanted "to go rob some people." Later that day, Cervantes met Ramirez at the home of a female friend who lived near 24th and L Streets. Cervantes stated that he had a beer and used cocaine while at the friend's house. Other people at the house included Jacob Shantz and Castaneda. Ramirez ultimately requested that Cervantes give Shantz a ride home, and Cervantes agreed. Castaneda accompanied them.

Cervantes testified that he and Ramirez were wearing black pants and gray, hooded sweatshirts and that Castaneda was wearing black pants and a black coat with fur trim. Ramirez was in the front passenger seat, and Castaneda and Shantz were sitting in the back seat.

Cervantes stated that as he was driving to Shantz' home, Ramirez asked to see the gun that Cervantes had recently purchased. The gun was under the driver's seat, wrapped in a blue bandanna. Cervantes said he handed the gun to Ramirez, and Ramirez placed the gun under his seat. After they dropped off Shantz, Cervantes, Ramirez, and Castaneda drove to 13th and Dorcas Streets where they saw two men getting out of a truck. Cervantes stated that Ramirez and Castaneda got out of the car and that he heard a gunshot shortly thereafter. Cervantes said Ramirez and Castaneda ran back to the car and stated that they had attempted to rob two white men, but that the men did not have any money and had "started getting crazy."

Cervantes testified that he then drove to 16th and Dorcas Streets, where he pointed out Silva as "the Mexican guy in the Blazer." Once again, Cervantes waited in the car while Ramirez and Castaneda got out. Cervantes said he heard two gunshots about a minute later. Cervantes stated that Ramirez later said that when Silva began blowing the car horn, Castaneda dragged Silva out of his vehicle and Ramirez shot him.

Cervantes testified that after the robbery and shooting of Silva, Cervantes drove to an area near 50th Street and Underwood Avenue, where they saw a man at an ATM. Cervantes said he waited on the other side of the street as Ramirez and Castaneda got out of the car. Cervantes said he heard two gunshots and then Ramirez and Castaneda came back to the car. Cervantes then drove south until they reached 52d and Leavenworth Streets.

Cervantes stated that Ramirez asked Cervantes to stop when Ramirez saw Glinsmann at the gas station. Ramirez and Castaneda got out of the car, and Cervantes parked in a nearby lot. Cervantes said he heard a gunshot and then Ramirez and Castaneda came back to the car and got in.

Cervantes stated that he drove back to the female friend's house near 24th and L Streets. On the way, Ramirez told Cervantes that Glinsmann had no money, that Castaneda pulled her out of the car, and that Ramirez shot her. Cervantes said he told Ramirez to keep the gun. After drinking beer and smoking marijuana for a short time, Cervantes returned to Jacobo's house. Cervantes testified that he stayed up most of the night smoking marijuana and finally went to bed in the early morning hours.

When Jacobo woke Cervantes the next morning, Cervantes said Jacobo appeared nervous. Jacobo asked Cervantes about the night before, because Jacobo noticed a number of police officers in the area. Cervantes said he told Jacobo about the robberies and told Jacobo that Ramirez "kind of went crazy with the gun." Jacobo told Cervantes to leave the home. Cervantes then went to his parents' house and stayed there.

Cervantes got a ride from Roberto Hidalgo to his parents' home after Jacobo asked him to leave. Hidalgo testified

that Cervantes said that "he [Cervantes] shot the guy and [Ramirez] did the rest." When police contacted Hidalgo shortly after the shootings, Hidalgo denied any knowledge of the crimes. Hidalgo later gave a statement to police and stated that Cervantes never mentioned Castaneda's involvement.

Five days after the shootings, the police contacted Cervantes and Cervantes denied all involvement. During a second interview on November 22, 2008, Cervantes admitted that he had been the driver of the car involved in the shootings and that Ramirez and Castaneda were also involved. Cervantes testified that he was tired of lying and that he was not initially completely truthful.

During cross-examination, Cervantes admitted that he lied to police on multiple occasions and that, in fact, he could not remember his lies. The trial court sustained the State's motion in limine to exclude all testimony regarding two polygraph examinations taken by Cervantes. Cervantes insisted that he was the driver of the vehicle, that Castaneda pulled Silva and Glinsmann out of their respective vehicles, and that Ramirez shot Silva, Denton, and Glinsmann.

3. Search Warrants

Castaneda's palmprint was found on the hood of Glinsmann's vehicle, the Ford Taurus she had borrowed, and a search warrant was issued for his residence. Items removed from Castaneda's bedroom included a dark-colored, hooded jacket, a disposable camera, a pair of shoes, an identification card, bandannas, and a blue spiral notebook.

During the initial search, an Omaha police officer observed a black jacket with a fur-lined hood. The jacket was not seized because it did not match any descriptions given by witnesses. However, the officer later viewed surveillance footage from the gas station where Glinsmann was shot and saw that one assailant was wearing a dark-colored, hooded jacket with fur trim.

An amended search warrant was executed on November 17, 2008, to look for the hooded jacket. Although the jacket was not found, a photograph taken with a disposable camera shows the fur-lined jacket in the background in Castaneda's bedroom.

An officer with the Omaha Police Department's gang unit also took a photograph of Castaneda in which he was wearing a black jacket with fur trim.

4. Forensic Evidence

A crime scene technician with a specialty in firearms and ammunition testified that to a reasonable degree of scientific certainty, all of the recovered bullets from all of the crime scenes were fired from the same weapon.

The Chevrolet Cavalier used in the commission of the crimes was searched. Among the items found were a gray, hooded sweatshirt and a brown leather wallet containing Silva's identification. Castaneda could not be excluded as a donor for the DNA swab of the outside of the right sleeve or the outside of the left sleeve of the sweatshirt. Castaneda also could not be excluded as the donor for the swabs taken of the side of the right seat and the back seat levers of the car, nor could Castaneda be excluded as a donor for DNA swabbed from a sports drink bottle found in the back seat of the Cavalier.

5. Alibi Evidence

Castaneda offered alibi evidence from John Orduna and Castaneda's stepmother, who both testified that Castaneda was at home the night of November 12, 2008. Orduna, who lived in the same apartment building as Castaneda and his family, testified that he saw Castaneda that night between 9:30 and 10 p.m., but certainly before 11 p.m. Orduna stated that he and his wife often sat on the porch of the apartment building drinking beer until 1:30 or 2 a.m. and that on November 12, Castaneda came out and spoke with them. Orduna said that Castaneda was alone, that Castaneda went back inside of the apartment building, and that Orduna and his wife were on the porch until late that night. On rebuttal, however, the State called the manager from the restaurant where Orduna's wife had been employed. Employment records indicated that Orduna's wife had not clocked out until nearly 1 a.m. on November 13.

Castaneda's stepmother testified that on November 12, 2008, Castaneda went to school and arrived home around 3:30 p.m.

Castaneda left the apartment with his father at approximately 6 p.m. to pick up Castaneda's girlfriend, and they took the girlfriend back home around 8:30 p.m. Castaneda and his father were home by 9 p.m., and Castaneda did not leave the apartment again that evening. Castaneda's stepmother testified that she was awake until 11 p.m. On cross-examination, however, she said that she was a sound sleeper and that she would not have awakened if Castaneda had left the apartment. She also stated that she did not recall seeing Orduna on the porch that day.

The jury found Castaneda guilty on all counts, and he appeals.

III. ASSIGNMENTS OF ERROR

Castaneda assigns that the trial court erred when it (1) allowed the jury to review an exhibit during its deliberations, (2) precluded him from offering evidence that Cervantes had failed a polygraph examination, (3) allowed cell phone records into evidence, (4) allowed the State to present fingerprint evidence, and (5) sustained the State's hearsay objection to an Internet news report. Castaneda also assigns that the accumulation of errors constitutes reversible error, even if any one error does not. In addition, he argues that the trial court erred when it unconstitutionally sentenced Castaneda to life in prison without the possibility of parole.

The State argues that the trial court committed plain error when it did not make the sentences for use of a deadly weapon consecutive to all convictions.

IV. STANDARD OF REVIEW

[1] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.[1]

[2] In making the determination as to factual questions, an appellate court does not reweigh the evidence or resolve

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[1] *State v. Ellis*, 281 Neb. 571, 799 N.W.2d 267 (2011).

conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.[2]

V. ANALYSIS

Castaneda's assignments of error generally fall into two categories: whether the trial court erred when it admitted or excluded certain evidence and whether it is unconstitutional to sentence a juvenile to life without the possibility of parole. We address the evidentiary issues first.

1. Evidentiary Issues

(a) Exhibit 201—Crime Scene Video

William Henningsen, a criminalist and expert in digital images and forensic video with the Omaha Police Department, removed the entire surveillance system from the gas station where Glinsmann was shot. The cameras were motion sensitive, and Henningsen was able to make a frame-by-frame copy of the video and to clarify and enlarge the images. Exhibit 201 was one of those enhanced copies, and it included yellow notes and arrows pointing to Glinsmann and "Subject #1" and "Subject #2."

During deliberations, the jury requested that it be allowed to review the complete video presentation created by Henningsen. The defense objected, asserting that it gave improper emphasis on Henningsen's testimony. The jury indicated that it wanted to review the gas station video in slow motion or frame-by-frame. The only exhibit that allowed for such a review was exhibit 201. With counsel present in the courtroom, the court allowed limited review of portions of exhibit 201, as requested by the jury. The jury was not allowed to take the exhibit to the jury room.

Castaneda claims it was error to allow the jury to review the exhibit because it was testimonial evidence that

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[2] *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010).

improperly emphasized Henningsen's testimony and not that of the other witnesses.

Conversely, the State argues that the video was substantive evidence of the Glinsmann murder and that Henningsen's notes did no more than indicate portions of the video that the members of the jury could view for themselves.

This court has previously noted that, generally, a trial court does not have discretion to submit testimony materials to the jury for unsupervised review, but that the trial court has broad discretion to submit to the jury nontestimonial exhibits, in particular, those constituting substantive evidence of the defendant's guilt.[3] And in this instance, the video to which Castaneda objects is substantive evidence of the crimes for which Castaneda was charged. The images from that video were proof that Castaneda was, in fact, one of the perpetrators of the charged murders.

Henningsen's testimony at trial provided an explanation of the techniques used to retrieve the video surveillance from the gas station and the steps he followed to organize the video for presentation for trial. But his notes to exhibit 201 were not part of that testimony; rather, the notes were merely intended to facilitate the jury's viewing of the exhibit.

And in any case, the trial court followed the procedure adopted by this court for use in determining when a jury should be permitted to view evidence after the parties rest. We have noted:

> When a jury makes a request to rehear certain evidence, the common-law rule requires that a trial court discover the exact nature of the jury's difficulty, isolate the precise testimony which can solve it, and weigh the probative value of the testimony against the danger of undue emphasis. If, after this careful exercise of discretion, the court decides to allow some repetition of the tape-recorded evidence for the jury, it can do so in open court

[3] *State v. Pischel*, 277 Neb. 412, 762 N.W.2d 595 (2009).

> in the presence of the parties or their counsel or under other strictly controlled procedures of which the parties have been notified.[4]

During deliberations, the jury asked to be allowed to watch the surveillance video in slow motion or frame-by-frame. After inquiring as to the specific testimony that would resolve the jury's question, the trial court determined that exhibit 201 was the only exhibit that would meet the jury's request. With counsel present in the courtroom, the court allowed the jury to review the exhibit. The trial court did not abuse its discretion in allowing the jury to review the video in the courtroom in the presence of counsel.

(b) Polygraph Examinations

Cervantes was given two polygraph examinations. The first was administered on April 16, 2010, after a jailhouse informant told police Cervantes had admitted that he shot Silva and that Ramirez shot Glinsmann. Cervantes was asked whether he had fired the shots that resulted in the deaths of Silva and Glinsmann. The officer administering the test determined that Cervantes was being deceptive in his answers to the questions about Silva. The test was inconclusive as to the questions about Glinsmann.

Cervantes was told by police that he failed the test. He was interviewed by police a second time, during which Cervantes explained that he believed he failed the first polygraph examination based on his guilt at having pointed out Silva to Ramirez and Castaneda. Cervantes was then asked to provide a written statement about the events of November 12, 2008, after which he was given a second polygraph examination. It consisted only of questions about whether the written statement was true. Cervantes was told he passed the second test.

The State made a motion in limine, seeking to bar the defense from mentioning the polygraph examinations or their results. The trial court sustained the motion, and in an offer of

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[4] *State v. Dixon*, 259 Neb. 976, 987, 614 N.W.2d 288, 297 (2000), *disapproved on other grounds*, *State v. Smith*, 284 Neb. 636, 822 N.W.2d 401 (2012).

proof, the defense showed generally that in the first polygraph examination given on April 16, 2010, Cervantes had been deceptive regarding his role in Silva's death and had denied telling the jailhouse informant he shot Silva.

Castaneda argues that he should have been allowed to cross-examine Cervantes regarding his failure of the first polygraph examination and that the failure to allow this questioning prevented him from presenting a complete defense as provided in *Holmes v. South Carolina*.[5]

In *Holmes*, the defendant sought to introduce evidence of a third party's guilt in order to raise doubt about his own guilt.[6] South Carolina rules of evidence prohibited admission of evidence relating to a third party's guilt if it "'"cast[s] a bare suspicion upon another"'" or "'"raise[s] a conjectural inference as to the commission of the crime by another."'"[7] The South Carolina Supreme Court held that because there was strong forensic evidence against the defendant, he could not introduce evidence of a third party's guilt simply to raise the inference of his own innocence.[8]

[3] The U.S. Supreme Court stated that while state courts have broad latitude to establish rules excluding evidence from criminal trials, that latitude has limits. "'Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense."'"[9] But the Supreme Court also noted that

> well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion

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[5] *Holmes v. South Carolina*, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006).

[6] *Id.*

[7] *Id.*, 547 U.S. at 324, quoting *State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532 (1941).

[8] *Id.*

[9] *Id.*, 547 U.S. at 324, quoting *Crane v. Kentucky*, 476 U.S. 683, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986).

> of the issues, or potential to mislead the jury. . . . Plainly referring to rules of this type, we have stated that the Constitution permits judges "to exclude evidence that is 'repetitive . . . , only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.'"[10]

Castaneda relies on cases from other jurisdictions to suggest that the evidence of polygraph examinations should have been admitted. However, we do not find the cases supportive of Castaneda's position. In *State v. McDonough*,[11] after the State's main witness to a robbery was told that he had failed a polygraph examination, he changed his testimony and identified the defendant as the robber. At trial, the witness admitted that he first attempted to change his testimony out of fear of retaliation by the defendant or his family. The defendant sought to impeach the witness with the polygraph evidence, seeking to demonstrate that the test was instrumental in procuring the witness' identification of the defendant at trial.[12] Under those circumstances, the court concluded, the polygraph examination was more probative than prejudicial. The court held that the admission of polygraph results was not unduly prejudicial to the defendant, but it cautioned that polygraph results are generally not admissible.

In *State v. Green*,[13] on cross-examination, the State referred to a polygraph examination taken by a witness who allegedly overheard a conversation that would have supported the defendant's claim of self-defense. On appeal, the State asserted that it referred to the polygraph to show that the witness "used facts he could not have known at the time of taking the polygraph examination to explain to police officers why he had failed the polygraph examination."[14] The appellate court held that statements made during a polygraph examination

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[10] *Id.*, 547 U.S. at 326-27, quoting *Crane*, *supra* note 9.

[11] *State v. McDonough*, 350 A.2d 556 (Me. 1976).

[12] *Id.*

[13] *State v. Green*, 245 Kan. 398, 781 P.2d 678 (1989).

[14] *Id.* at 406, 781 P.2d at 685.

are admissible to demonstrate a lack of credibility but that the results of a polygraph examination are excluded because of their unreliability.[15]

Factually similar to the case at bar, in *U.S. v. Pitner*,[16] an informant was given a polygraph examination and gave answers that indicated deception. After the informant was confronted with the results of the examination, he changed his story. The federal district court ultimately admitted the evidence that the witness changed his story, but excluded the results of the examination itself.

[4,5] In the case at bar, Castaneda is seeking to admit the *results* of the polygraph examinations. In *United States v. Scheffer*,[17] the U.S. Supreme Court has held that an evidentiary rule categorically excluding polygraph results is not arbitrary, because state and federal governments have broad latitude to establish rules excluding evidence from criminal trials. There is no consensus that polygraph evidence is reliable, and a fundamental principle of the justice system is that the jury is the lie detector, determining the weight and credibility of witness testimony.[18] The *Holmes* Court cited *Scheffer* with approval as a case involving an evidentiary rule that was *not* arbitrary or unreasonable.[19]

[6] In Nebraska, we have held that polygraph results are generally inadmissible as unduly prejudicial.[20] However, in *State v. Riley*,[21] where the mere mention that a witness had taken a polygraph examination and presumably passed it bolstered the witness' credibility, we concluded that the trial court abused its discretion when it overruled the defendant's motion for a mistrial based on the polygraph reference. Implicit in our

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[15] *Id.*

[16] *U.S. v. Pitner*, 969 F. Supp. 1246 (W.D. Wash. 1997).

[17] *United States v. Scheffer*, 523 U.S. 303, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998).

[18] *Id.*

[19] *Holmes*, *supra* note 5.

[20] See *State v. Riley*, 281 Neb. 394, 796 N.W.2d 371 (2011).

[21] *Id.*

holding was the proposition that it was the jury's responsibility to determine the credibility of witnesses.

Castaneda claims that he wanted to be able to confront Cervantes with the fact that he had changed his version of events after he was told he failed the first polygraph examination. But ultimately, Castaneda is seeking to admit the results of the polygraph to cast doubt on Cervantes' credibility as a witness—something that the jury, as fact finder, is charged with determining. Similar to *Riley*, in which the mention of a polygraph examination bolstered a witness' testimony, the mention of Cervantes' failed polygraph examination in this case would cast doubt on his credibility.

Furthermore, Castaneda had the opportunity to rigorously cross-examine Cervantes regarding the conflicting statements he made to police. Castaneda also cross-examined the police officer who reinterviewed Cervantes and asked the officer's opinion as to whether Cervantes lied about his role in the shootings. The following exchange occurred during the recross-examination of the officer:

> [Defense counsel:] And when you say you wanted to see if [Cervantes] was telling the truth, you mean you would challenge him with statements of other people?
>
> [Officer:] Correct.
>
> Q. And you told him flat out he was lying to you, didn't you?
>
> A. Yes, I did.
>
> Q. And you had reason to believe that he was lying to you, didn't you?
>
> A. With the change of information, yes.
>
> Q. Is that the only reason? Just yes or no.
>
> A. Is that the only reason?
>
> Q. That you had reason to believe he wasn't telling the truth?
>
> A. No.

The officer ultimately testified that Cervantes changed some details but that overall, Cervantes' version of the events of November 12, 2008, did not change. The jury also heard testimony from the person who gave Cervantes a ride the day after

the shooting and from the jailhouse informant who claimed that Cervantes had admitted to killing Silva. While the particulars of Cervantes' story changed, he never wavered in his statements to police that he was the driver of the vehicle on the night of the shootings, that Castaneda was involved, and that Ramirez shot Silva and Glinsmann.

Castaneda was able to thoroughly cross-examine Cervantes regarding the conflicting statements he made to police and was able to systematically develop his defense by showing that Cervantes lied to police and that Cervantes changed his story when he was confronted with his lies. Without being told of the polygraph examinations or their results, the jury was made aware that police had reason to believe that Cervantes was lying. It was not necessary to actually ask Cervantes if he failed the first polygraph examination.

As the U.S. Supreme Court noted, the jury acts as a lie detector, and as the finder of fact, the jury was responsible for determining whether Cervantes was a credible witness.[22] The trial court did not err in sustaining the State's motion in limine excluding the results of the polygraph examinations. Castaneda's second assignment of error is without merit.

(c) Cell Phone Records

Castaneda next assigns that the trial court erred by admitting the records of cell phone calls and text messages.

The operations coordinator for a cell phone company in Nebraska testified as a custodian of records for that company. Records of cell phone calls and texts are each stored in different servers for 6 months. Data are recorded at the time a call is made or a text is sent. A subpoena was issued for the cell phone numbers registered to Castaneda's stepmother and to Ramirez. The records showed no calls on Castaneda's cell phone between 9:50 p.m. and 11:44 p.m. on November 12, 2008. Cell phone activity resumed at 11:44 p.m. and continued until 12:25 a.m.

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[22] See *Scheffer, supra* note 17.

Castaneda argues that computer-generated records which are manually entered are not assertions of a declarant and should be scrutinized for admissibility under rule 901,[23] which provides the requirements for authentication or identification of evidence.

[7] We recently addressed a similar argument in *State v. Taylor*.[24] We stated that "[i]f the proponent's showing is sufficient to support a finding that the evidence is what it purports to be, the proponent has satisfied the requirement of rule 901(1)."[25] "The foundation of trustworthiness required by the business records exception is sufficient to satisfy the authentication requirement of rule 901."[26] In *Taylor*, the cell phone records at issue were authenticated by the same employee who testified in the case at bar. The employee's testimony in *Taylor* was sufficient to authenticate the cell phone records, and it is also sufficient in this case.

Our opinion in *Taylor* was released after Castaneda submitted his briefs. Castaneda conceded at oral argument that *Taylor* resolved the issue. This assignment of error is therefore without merit.

(d) Fingerprint Evidence

At trial, the court received into evidence the surveillance footage from the gas station where Glinsmann was shot and a latent palmprint lifted from the hood of Glinsmann's vehicle, the Ford Taurus she had borrowed. Glinsmann's vehicle was towed to the police garage at the impound lot for processing. Because the vehicle was dirty, areas where dirt had been disturbed were visible and crime scene technicians were able to check for latent prints on those areas. Video surveillance from the gas station also showed the assailants pass near the hood of the vehicle.

A crime scene technician with a specialty in fingerprint identification testified that she dusted the exterior of

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[23] Neb. Evid. R. 901, Neb. Rev. Stat. § 27-901 (Reissue 2008).

[24] *State v. Taylor*, 282 Neb. 297, 803 N.W.2d 746 (2011).

[25] *Id.* at 315, 803 N.W.2d at 760.

[26] *Id.* at 315, 803 N.W.2d at 761.

Glinsmann's vehicle for fingerprints, concentrating on areas where it appeared that the dust and dirt on the vehicle had been smudged. The fingerprint specialist lifted three latent prints from the vehicle: one from above the driver's-side door handle, which print belonged to Glinsmann, and two on the hood of the vehicle on the passenger side, which prints appeared to be two parts of a left palmprint. That palmprint was later identified as belonging to Castaneda.

Castaneda argues that the trial court committed reversible error when it allowed the State to present testimony regarding fingerprint identification through the use of the "Automated Fingerprint Identification System" (AFIS), a database of prints on file from Nebraska. Castaneda claims that because the fingerprint specialist did not know when Castaneda's prints were scanned into AFIS, any testimony regarding AFIS was hearsay. Castaneda suggests that testimony should have been elicited to show the process used to enter his fingerprints into AFIS. Without such testimony, Castaneda claims there was insufficient foundation.

[8] An appellate court reviews a trial court's ruling on authentication for an abuse of discretion.[27] We note that although Castaneda attacked the scientific validity and reliability of fingerprint identification at trial, he does not raise that issue on appeal.

In support of his argument, Castaneda cites a North Carolina case in which an officer compared the latent fingerprint to a "master file," and then compared fingerprints taken by the officer to latent prints found at the scene of the crime.[28] The North Carolina court determined that testimony regarding the master file fingerprint violated the hearsay rule and should have been excluded. If the conviction rested on the fingerprint evidence, it could not stand. However, the court found that the "evidence as to the common origin of [the] defendant's known fingerprint and the latent print . . . is so overwhelming, and the prejudicial effect of the incompetent testimony concerning the master file fingerprint is so

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[27] See *State v. Pullens*, 281 Neb. 828, 800 N.W.2d 202 (2011).

[28] See *State v. Foster*, 284 N.C. 259, 263, 200 S.E.2d 782, 786 (1973).

insignificant by comparison, that the incompetent evidence was harmless beyond a reasonable doubt."[29] Exclusion of the evidence concerning the master file fingerprint would not have produced a different result.[30]

We find *Foster* persuasive but unhelpful to Castaneda's arguments. The technician in *Foster* used virtually the same procedure used by the technicians in the case at bar. After using a "master file" or AFIS to make a preliminary identification, a new set of inked prints was taken from the subject. Those prints were then compared to the latent prints found at the crime scene. Therefore, even if testimony regarding the "master file" prints, or the prints found in AFIS, could be considered inadmissible hearsay, the error was harmless, because the actual identification was made from the inked prints that the technician personally obtained from Castaneda.

In addition, Castaneda was able to cross-examine the fingerprint specialist thoroughly on her credentials and training, as well as on the fact that she did not know any details concerning the date Castaneda's prints were scanned into AFIS or the identity of the person who completed the scan. As pointed out by the State, whether the known prints in AFIS belonged to Castaneda went to the weight of the evidence, which is determined by a jury.[31] The trial court did not abuse its discretion by allowing the testimony. This assignment of error is also without merit.

(e) Internet News Report

Castaneda offered into evidence a printout of an Internet news story that indicated Castaneda's palmprint had been found on the hood of the Glinsmann vehicle at 52d and Leavenworth Streets. The trial court refused to allow it, finding that it was inadmissible hearsay.

Castaneda argues that the story was not offered for the truth of the matter asserted, but, rather, was offered to demonstrate that it was public knowledge that Castaneda had been arrested,

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[29] *Id.* at 274, 200 S.E.2d at 793.

[30] *Id.*

[31] See *State v. Chavez*, 281 Neb. 99, 793 N.W.2d 347 (2011).

that his palmprint was found at the scene, and that Cervantes named Castaneda, who had been arrested, to turn suspicion away from himself.

[9] Under evidence rule 103[32]:

> (1) Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and:
>
> . . . .
>
> (b) In case the ruling is one excluding evidence, the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked.

When Castaneda sought to introduce the news story during trial, he did not argue that the story would demonstrate that fingerprint evidence linking Castaneda to the crime was public knowledge. Castaneda argued only that the story was not being offered for the truth of the matter. He failed to establish the news story's relevance, and we find no error in the trial court's refusal to admit it into evidence.

(f) Cumulative Errors

Also without merit is Castaneda's assignment of error that the cumulative errors require reversal and a new trial. Because we find no merit to any of Castaneda's assignments of error, there are no cumulative errors, and we accordingly reject this argument.

2. Sentences

(a) Arguments on Appeal

Castaneda argues that the district court erred in sentencing him to life imprisonment without the possibility of parole. The basis of Castaneda's argument at the time this case was originally argued was that the U.S. Supreme Court's decision in *Graham v. Florida*[33] categorically prohibited a sentence of life imprisonment without the possibility of parole for

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[32] Neb. Evid. R. 103, Neb. Rev. Stat. § 27-103 (Reissue 2008).

[33] *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).

juvenile offenders. In *Graham*, a juvenile who participated in an armed robbery was charged as an adult and sentenced to life imprisonment without the possibility of parole. The Supreme Court ruled that sentencing a juvenile to life imprisonment without parole for a nonhomicide crime was a violation of the Eighth Amendment prohibition against cruel and unusual punishment.

(b) *Miller v. Alabama*

Following the submission of Castaneda's appeal to this court, the U.S. Supreme Court decided *Miller v. Alabama*.[34] *Miller* held it is unconstitutional to sentence a juvenile convicted of a homicide to a mandatory sentence of life imprisonment without the possibility of parole.

(c) Further Argument

This court ordered further argument on the impact of *Miller* on Castaneda's sentence. During those arguments, the State argued that Castaneda's sentences are unaffected by *Miller* because they were not sentences without the possibility of parole. Rather, upon commutation to a term of years, parole would be available to Castaneda. The State further argued that if *Miller* did apply, Castaneda's current sentences of life imprisonment without the possibility of parole should be vacated and the cause remanded for resentencing in light of the sentencing factors discussed in *Miller*.

Conversely, Castaneda argued that the sentences imposed upon him were without the possibility of parole and that thus, *Miller* was applicable. Castaneda further argued that as a result of *Miller*, he could not be charged with a Class IA felony, because the only allowable sentence for such a felony would be life imprisonment. Castaneda instead asserted that he should be sentenced for second degree murder, a Class IB felony, because it is the "most serious degree of homicide for which he may be prosecuted" and thus provides the sentencing court

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[34] *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

with the individualized sentencing options required by *Graham* and *Miller*.[35]

(d) Life Imprisonment Without Possibility of Parole

We first address the State's contention that *Miller* is inapplicable because Castaneda was not sentenced to life imprisonment without the possibility of parole.

At the time Castaneda was sentenced, Nebraska's statutes provided that a juvenile convicted of first degree murder was subject to mandatory life imprisonment. The statutes did not expressly contain the qualifier "without parole."[36] However, according to Neb. Rev. Stat. § 83-1,110 (Reissue 2008), a committed offender becomes eligible for parole in Nebraska after serving "one-half the minimum term of his or her sentence." Because there is no way to compute "one-half" of a life sentence, an offender sentenced to life imprisonment in Nebraska for first degree murder is not eligible for parole.[37] Instead, although such an offender has his record reviewed by the Board of Parole every 10 years, he or she is not eligible for parole until the "sentence is commuted."[38] If commutation occurs, the offender's record is reviewed annually when he or she is within 5 years of parole eligibility.[39]

In the State's supplemental brief, it argues that *Miller* barred only those sentences denying any "'possibility of parole.'"[40] It contends that Nebraska's scheme does not fall within this category, because parole is *possible* in Nebraska if the sentence is commuted to a term of years. Specifically, Neb. Const. art. IV, § 13, authorizes the Board of Pardons, a group composed

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[35] Supplemental brief for appellant at 20.

[36] See Neb. Rev. Stat. §§ 28-105 and 28-105.01 (Reissue 2008).

[37] *Poindexter v. Houston*, 275 Neb. 863, 750 N.W.2d 688 (2008). See *State v. Marrs*, 272 Neb. 573, 723 N.W.2d 499 (2006).

[38] Neb. Rev. Stat. § 83-192(1)(f)(v) (Reissue 2008).

[39] *Id.*

[40] Supplemental brief for appellee at 2, quoting *Graham*, *supra* note 33.

of the Governor, the Attorney General, and the Secretary of State,[41] to commute the sentence in "all cases of conviction," which includes sentences of life imprisonment.[42] Once the sentence is so commuted, the Board of Parole can review the sentence and release an inmate on parole.[43] According to the State, under Nebraska law, Castaneda therefore has some possibility of being paroled, and thus his sentences do not violate *Miller*.

But the mere existence of a remote possibility of parole does not keep Nebraska's sentencing scheme from falling within the dictates of *Miller*. *Miller* requires the sentencing scheme to provide "'some *meaningful* opportunity to obtain release based on demonstrated maturity and rehabilitation.'"[44] *Miller* cited the scheme in *Graham* as coming within its dictates. And the scheme at issue in *Graham*, like Nebraska's, did not expressly provide that the life sentence was "without parole." Nevertheless, the Court held in *Graham* that because Florida had abolished its parole system, the sentence effectively gave the defendant no possibility of release "unless he is granted executive clemency."[45]

Similarly, in *Bonilla v. State*,[46] the Iowa Supreme Court addressed whether *Graham* applied to a juvenile defendant convicted of a nonhomicide offense. Iowa's statute provided that the defendant's sentence was for life and that he "'shall not be released on parole unless the governor commutes the sentence to a term of years.'"[47] The Iowa court held that the fact that the defendant could "theoretically" receive a commutation was too much of a "'remote possibility'" to support

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[41] Neb. Rev. Stat. § 83-1,126 (Reissue 2008).

[42] See, *Poindexter, supra* note 37; *Otey v. State*, 240 Neb. 813, 485 N.W.2d 153 (1992).

[43] § 83-192(1)(f)(v).

[44] *Miller, supra* note 34, 132 S. Ct. at 2469 (emphasis supplied), quoting *Graham, supra* note 33.

[45] *Graham, supra* note 33, 560 U.S. at 57.

[46] *Bonilla v. State*, 791 N.W.2d 697 (Iowa 2010).

[47] *Id*. at 700, quoting Iowa Code Ann. § 902.1 (West 2003).

an argument that the defendant's sentence was not without parole.[48]

And in *State v. Dyer*,[49] a Louisiana court found that defendants sentenced to life imprisonment were effectively sentenced to life without parole when they could not be eligible for parole "'until [the] life sentence has been commuted to a fixed term of years.'" Noting that in Louisiana, the governor had complete discretion regarding whether to commute a sentence, *Dyer* held that the sentences were effectively without parole and fell under the dictates of *Graham*.[50]

In addition, the U.S. Supreme Court itself has opined on the substantial difference between executive commutation power and parole.[51] According to the Court, parole and commutation are different concepts as a matter of law, because parole is "a regular part of the rehabilitative process,"[52] while commutation is "an ad hoc exercise of executive clemency."[53]

Nebraska's parole system has absolutely no application to Castaneda unless and until executive clemency in the form of sentence commutation is granted. And in Nebraska, executive clemency is a "'*free gift from the supreme authority*,'" "'*to be bestowed according to his own discretion*.'"[54] The Board of Pardons thus has the unfettered discretion to grant or deny a commutation for any reason or for no reason at all.[55] The sentencing scheme here and the availability of executive clemency under only a standard of unfettered discretion is remarkably similar to Florida, Iowa, and Louisiana. We find that Nebraska's sentence of life imprisonment is effectively life imprisonment without parole under the rationale of *Miller*

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[48] *Id.* at 700 n.2.

[49] *State v. Dyer*, 77 So. 3d 928, 929 (La. 2011).

[50] *Id.*

[51] *Solem v. Helm*, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983).

[52] *Id.*, 463 U.S. at 300.

[53] *Id.*, 463 U.S. at 301.

[54] *Otey, supra* note 42, 240 Neb. at 824, 485 N.W.2d at 163 (emphasis in original), quoting *Pleuler v. State*, 11 Neb. 547, 10 N.W. 481 (1881).

[55] *Poindexter, supra* note 37.

and *Graham*, because it provides no meaningful opportunity to obtain release. As such, we reject the State's argument that *Miller* is inapplicable because Castaneda was not sentenced to life imprisonment without the possibility of parole.

(e) *Griffith v. Kentucky*

Other than arguing that *Miller* was inapplicable for the reasons detailed and rejected above, the State concedes that *Miller*, as a new rule of law, would be applicable to any case on direct review. Castaneda concurs, and we agree. *In Griffith v. Kentucky*,[56] the U.S. Supreme Court held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." Because this case is currently on direct appeal, *Miller* is applicable to Castaneda.

(f) L.B. 44 and §§ 28-105.02 and 83-1,110.04

Since we heard further arguments, the Nebraska Legislature passed, and the Governor approved, 2013 Neb. Laws, L.B. 44, which amended state law to "change penalty provisions with respect to Class IA felonies committed by persons under eighteen years of age [and] to change parole procedures with respect to offenses committed by persons under eighteen years of age."

Neb. Rev. Stat. § 28-105.02 (Supp. 2013) provides:

> (1) Notwithstanding any other provision of law, the penalty for any person convicted of a Class IA felony for an offense committed when such person was under the age of eighteen years shall be a maximum sentence of not greater than life imprisonment and a minimum sentence of not less than forty years' imprisonment.
>
> (2) In determining the sentence of a convicted person under subsection (1) of this section, the court shall

[56] *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987).

consider mitigating factors which led to the commission of the offense. The convicted person may submit mitigating factors to the court, including, but not limited to:

(a) The convicted person's age at the time of the offense;

(b) The impetuosity of the convicted person;

(c) The convicted person's family and community environment;

(d) The convicted person's ability to appreciate the risks and consequences of the conduct;

(e) The convicted person's intellectual capacity; and

(f) The outcome of a comprehensive mental health evaluation of the convicted person conducted by an adolescent mental health professional licensed in this state. The evaluation shall include, but not be limited to, interviews with the convicted person's family in order to learn about the convicted person's prenatal history, developmental history, medical history, substance abuse treatment history, if any, social history, and psychological history.

And Neb. Rev. Stat. § 83-1,110.04 (Supp. 2013) further provides:

(1) Any offender who was under the age of eighteen years when he or she committed the offense for which he or she was convicted and incarcerated shall, if the offender is denied parole, be considered for release on parole by the Board of Parole every year after the denial.

(2) During each hearing before the Board of Parole for the offender, the board shall consider and review, at a minimum:

(a) The offender's educational and court documents;

(b) The offender's participation in available rehabilitative and educational programs while incarcerated;

(c) The offender's age at the time of the offense;

(d) The offender's level of maturity;

(e) The offender's ability to appreciate the risks and consequences of his or her conduct;

(f) The offender's intellectual capacity;

(g) The offender's level of participation in the offense;

(h) The offender's efforts toward rehabilitation; and

(i) Any other mitigating factor or circumstance submitted by the offender.

(g) Disposition

At the time of Castaneda's sentencing for the first degree murder convictions, Class IA felonies, the district court was required by § 28-105(1) to impose sentences of life imprisonment. As we have explained, those sentences were tantamount to life imprisonment without the possibility of parole and, under *Miller*, were unconstitutional. As such, Castaneda's life imprisonment sentences must be vacated and Castaneda must be resentenced.

Subsequent to the enactment of L.B. 44, this court sought supplemental briefing on the issue of whether Castaneda should be resentenced under the provisions of L.B. 44. The State contends that L.B. 44 should be utilized; Castaneda argues that to do so would violate the Ex Post Facto Clauses of the U.S.[57] and Nebraska Constitutions.[58]

[10,11] This court ordinarily construes Nebraska's ex post facto clause to provide no greater protections than those guaranteed by the federal Constitution.[59] We have said that "'[a] law which purports to apply to events that occurred before the law's enactment, and which disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed, is an ex post facto law and will not be endorsed by the courts.'"[60]

We have also held:

> "Any statute which punishes as a crime an act previously committed which was innocent when done, which makes more burdensome the punishment for a crime after its commission, or which deprives one charged with a

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[57] U.S. Const. art. I, § 10.

[58] Neb. Const. art. I, § 16.

[59] *State v. Kibbee*, 284 Neb. 72, 815 N.W.2d 872 (2012).

[60] *Id.* at 83, 815 N.W.2d at 884.

> crime of any defense available according to law at the time when the act was committed is prohibited as ex post facto. The Ex Post Facto Clause does not, however, extend to limit legislative control of remedies and modes of procedure which do not affect matters of substance. Thus, statutes governing substantive matters in effect at the time of a crime govern, and not later enacted statutes. In contrast, the procedural statutes in effect on the date of a hearing or proceeding govern, and not those in effect when the violation took place.
>
> "A change in law will be deemed to affect matters of substance where it increases the punishment or changes the ingredients of the offense or the ultimate facts necessary to establish guilt. In other words, a rule is substantive if it alters the range of conduct or the class of persons that the law punishes. In contrast, rules that regulate only the manner of determining a defendant's culpability are procedural."[61]

We are therefore faced with the issue of whether the sentencing provisions set forth in L.B. 44 increase the punishment or change the ingredients of the offense or the ultimate facts necessary to establish guilt. Because L.B. 44 deals with sentencing, it does not affect the ingredients of the offense or the facts necessary to establish guilt. Thus, we must answer whether L.B. 44 increases the punishment; if it does, then the change is substantive and ex post facto principles bar application of L.B. 44 to Castaneda on resentencing.

Castaneda argues that we must determine whether L.B. 44 increases the punishment by comparing the possible range of sentences under L.B. 44 with the possible range of sentences for a Class IB felony. This argument is based upon Castaneda's contention that because *Miller* invalidated the Nebraska sentencing scheme for Class IA felonies committed by juveniles, a Class IB felony is the "most serious degree of homicide for which he may be prosecuted."[62]

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[61] *Id.*

[62] Supplemental brief for appellant at 21.

We find this argument contradicts precedent from the U.S. Supreme Court. In *Dobbert v. Florida*,[63] the defendant was convicted of first degree murder. At the time the murder was committed, the applicable Florida statute provided that the murder was to be punished by death unless the jury recommended mercy. Before the case came to final judgment, the Florida Supreme Court, based on a U.S. Supreme Court decision, found the statute to be unconstitutional.[64] Florida then enacted a new statute specifying procedures to be utilized prior to the imposition of a death penalty. On appeal, the defendant argued that applying the new statute to him would violate ex post facto principles by increasing the punishment he was subject to. His argument was that because the prior statute was found to be unconstitutional, there was no valid death penalty in Florida as of the date of his actions, and that he thus could not be subjected to that penalty under the new statute. The Court rejected this argument, concluding:

> [T]his sophistic argument mocks the substance of the *Ex Post Facto* Clause. Whether or not the old statute would, in the future, withstand constitutional attack, it clearly indicated Florida's view of the severity of murder and of the degree of punishment which the legislature wished to impose upon murderers. The statute was intended to provide maximum deterrence, and its existence on the statute books provided fair warning as to the degree of culpability which the State ascribed to the act of murder.
>
> . . . Here the existence of the statute served as an "operative fact" to warn the petitioner of the penalty which Florida would seek to impose on him if he were convicted of first-degree murder. This was sufficient compliance with the *ex post facto* provision of the United States Constitution.[65]

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[63] *Dobbert v. Florida*, 432 U.S. 282, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977).

[64] See *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).

[65] *Dobbert*, *supra* note 63, 432 U.S. at 297.

Dobbert makes it clear that the effect of *Miller* on Nebraska law is not a factor in the ex post facto analysis of whether a later-enacted statute increases punishment for a crime. Rather, the proper comparison is the range of penalties that Nebraska law provided for a Class IA felony committed by a juvenile at the time Castaneda committed his crimes, within the range of penalties Nebraska law provides for a Class IA felony committed by a juvenile at the time Castaneda is resentenced. We observe that this is consistent with the underlying purpose of the Ex Post Facto Clause: to "assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed."[66]

At the time Castaneda was sentenced, the only possible sentence for a first degree murder committed by a juvenile was life imprisonment. Under L.B. 44, the sentence is anywhere from 40 years to life imprisonment.[67] The possible range of sentences provided for in L.B. 44 is not greater than the possible range of sentences which Castaneda was originally subjected to.[68] As such, the change effected by L.B. 44 does not violate ex post facto principles.

[12] Nor is it inconsistent under Nebraska law for this mitigation in sentencing to apply upon resentencing. "[W]here a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise."[69] And in this case, the Legislature has not provided otherwise. We therefore vacate Castaneda's life sentences and remand the cause for resentencing under the procedures set forth under L.B. 44.

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[66] *Weaver v. Graham*, 450 U.S. 24, 28-29, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981).

[67] See § 28-105.02(1).

[68] See §§ 28-105 and 28-105.01.

[69] *State v. Randolph*, 186 Neb. 297, 301-02, 183 N.W.2d 225, 228 (1971). See, *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999); *State v. Groff*, 247 Neb. 586, 529 N.W.2d 50 (1995).

We decline to address Castaneda's argument under *Graham* as presented by his brief on appeal, because the possibility exists that upon remand, Castaneda might not be resentenced to life imprisonment.

Finally, the State argues that the district court committed plain error when it failed to order Castaneda's three sentences for use of a deadly weapon to run consecutively "to *all* other sentences imposed."[70] We agree and vacate all of Castaneda's other sentences and remand the cause for resentencing.[71]

VI. CONCLUSION

Castaneda's assignments regarding trial error are without merit. But the life imprisonment sentences imposed upon Castaneda were effectively life imprisonment without the possibility of parole and unconstitutional under *Miller*.[72] We accordingly vacate those unconstitutional sentences and remand the cause for resentencing. We also vacate all of Castaneda's other sentences, because the district court committed plain error in ordering some of those sentences to run concurrently rather than consecutively.

CONVICTIONS AFFIRMED, ALL SENTENCES VACATED, AND CAUSE REMANDED FOR RESENTENCING.

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[70] Brief for appellee at 75 (emphasis in original).

[71] See, Neb. Rev. Stat. § 28-1205(3) (Cum. Supp. 2012); *State v. Scott*, 284 Neb. 703, 824 N.W.2d 668 (2012); *State v. Russell*, 248 Neb. 723, 539 N.W.2d 8 (1995).

[72] *Miller, supra* note 34.

STATE OF NEBRASKA, APPELLEE, V.
DOUGLAS M. MANTICH, APPELLANT.
842 N.W.2d 716

Filed February 7, 2014. No. S-11-301.

1. **Constitutional Law: Sentences.** Whether a sentence violates the Eighth Amendment's cruel and unusual punishment clause presents a question of law.
2. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.

3. **Constitutional Law: Criminal Law: Statutes: Convictions: Sentences: Time.** When a decision of the U.S. Supreme Court results in a "new rule," that rule applies to all criminal cases still pending on direct review. As to convictions that are already final, however, the rule applies only in limited circumstances. New substantive rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish.
4. **Constitutional Law: Criminal Law: Time.** New rules of procedure generally do not apply retroactively. The only exception is those rules that are "watershed rules of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceedings.
5. **Constitutional Law: Criminal Law: Minors: Sentences: Time: Appeal and Error.** The holding of the U.S. Supreme Court in *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), that the Eighth Amendment forbids a sentencing scheme which mandates life in prison without the possibility of parole for juvenile offenders, is a new substantive rule of constitutional law which applies retroactively to criminal cases on collateral review.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Sentence vacated, and cause remanded for resentencing.

Adam J. Sipple, of Johnson & Mock, for appellant.

Jon Bruning, Attorney General, and J. Kirk Brown for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

STEPHAN, J.

In 1994, Douglas M. Mantich was convicted of first degree murder and use of a firearm to commit a felony. He was sentenced to life imprisonment for the murder conviction and 5 to 20 years' imprisonment for the firearm conviction. The murder was committed when Mantich was 16 years old. On direct appeal, we affirmed his convictions and life imprisonment sentence and vacated and remanded his firearm sentence for resentencing.[1]

[1] *State v. Mantich*, 249 Neb. 311, 543 N.W.2d 181 (1996).

In 2010, Mantich filed an amended postconviction motion alleging his life imprisonment sentence violated the Eighth Amendment's prohibition on cruel and unusual punishment because it was (1) categorically prohibited under the U.S. Supreme Court's holding in *Graham v. Florida*[2] and (2) grossly disproportionate to the offense for which he was convicted. Mantich also alleged that the attorney who represented him at his trial and on direct appeal was ineffective in not asserting these Eighth Amendment claims. The district court denied the postconviction motion without conducting an evidentiary hearing, and Mantich appealed from that order.

We heard oral arguments in the appeal on October 7, 2011. On July 11, 2012, we set the case for reargument and ordered supplemental briefing after the U.S. Supreme Court held in *Miller v. Alabama*[3] that the Eighth Amendment forbids a state sentencing scheme that mandates life in prison without the possibility of parole for a juvenile offender convicted of homicide. We now hold that Mantich's life imprisonment sentence is unconstitutional under *Miller*.

I. FACTS

On December 5, 1993, a gathering was held to mourn the death of a "Lomas" gang member. Several members of the gang attended the party, including Mantich, Gary Brunzo, Daniel Eona, Juan Carrera, and Angel Huerta. At the gathering, Mantich consumed between 5 and 10 beers and smoked marijuana in a 2½-hour period.

Sometime after 1 a.m., Carrera decided that he wanted to steal a car and commit a driveby shooting of a member of a rival gang. While holding a gun, Eona responded that he also wanted to steal a car and talked about "jackin' somebody" and "putting a gun to their head." Brunzo and Eona then walked toward Dodge Street to steal a vehicle. They returned about 20 minutes later in a stolen red minivan, and Carrera and Huerta

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[2] *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).

[3] *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

got in. Over his girlfriend's objection and attempt to physically restrain him, Mantich also got into the van.

The van had no rear seats. Eona was in the driver's seat, and Brunzo was in the front passenger seat. Carrera sat behind the driver's seat; Huerta sat on the passenger side, close to the sliding side door; and Mantich sat behind Carrera and Huerta, toward the back of the van. After a short time, Mantich realized that a man, later identified as Henry Thompson, was in the van. Thompson was kneeling between the driver's seat and the front passenger seat with his hands over his head and his head facing the front of the van.

The gang members began chanting "Cuz" and "Blood." Mantich thought the purpose was to make Thompson believe they were affiliated with a different gang. Eona demanded Thompson's money, and Brunzo told Thompson they were going to shoot him. Mantich saw Brunzo and Eona poke Thompson in the head with their guns. Eventually, a shot was fired and Thompson was killed. Thompson's body was pulled out of the van and left on 13th Street.

The group then drove to Carrera's house so he could retrieve his gun. After this, they drove by a home and fired several shots at it from the vehicle. Later, they sank the van in the Missouri River and walked back to 13th Street. From there, Mantich and Huerta took all the guns and went to Huerta's house to hide them. Brunzo, Eona, and Carrera walked toward the area of Thompson's body.

After hiding the guns with Huerta, Mantich walked to Brian Dilly's house. While still intoxicated, Mantich told Dilly and Dilly's brothers about the events of the night. Mantich claimed he had pulled the trigger and killed Thompson. When the 6 o'clock news featured a story on the homicide, Mantich said, "'I told you so,'" and "'I told you I did it.'" About an hour after the newscast, Mantich told Dilly that Brunzo was actually the person who shot and killed Thompson. The police later learned about Mantich's conversations with Dilly, and arrest warrants were issued for Mantich, Brunzo, Eona, and Carrera. Mantich was arrested on January 4, 1994.

Mantich agreed to talk with Omaha police about what happened and initially claimed that Brunzo shot Thompson. The

police told Mantich that statements were being obtained from Brunzo, Eona, and Carrera and that Mantich's statement was inconsistent with the information the police had acquired. The police also told Mantich that Dilly said Mantich confessed to shooting Thompson. Mantich admitted telling Dilly he shot Thompson, but explained that it was a lie and that he was only trying to look like "a bad ass." Mantich claimed that he had not shot anyone and that Brunzo was the shooter.

The police then told Mantich they knew what happened and assured Mantich that his family and girlfriend "would not abandon him" if he told the truth. At this point, Mantich admitted that he had pulled the trigger. Mantich said, "'I'm sorry it happened. I wished it wouldn't have happened.'" Mantich further stated, "'They handed me the gun and said shoot him, so I did it.'" Mantich again confessed during a taped statement to shooting Thompson.

Mantich testified in his own behalf at trial. He acknowledged his statements to Dilly and the police that he had shot Thompson, but told the jury that he had not shot Thompson. On September 26, 1994, the jury returned a verdict of guilty on one charge of first degree murder and one charge of use of a firearm to commit a felony.

1. Sentencing and Direct Appeal

In October 1994, the district court sentenced Mantich to a term of life imprisonment on the first degree murder conviction and to 5 to 20 years' imprisonment on the conviction of use of a firearm to commit a felony. Mantich's life imprisonment sentence carries no possibility of release on parole unless the Board of Pardons commutes his sentence to a term of years.[4] The court ordered the sentences to run consecutively.

On direct appeal, Mantich assigned various errors, including that the evidence was insufficient to support his convictions. He did not assert an Eighth Amendment claim with respect to his life imprisonment sentence. We found no merit in any of his assignments of error, but concluded that there was plain

[4] See, Neb. Const. art. IV, § 13; Neb. Rev. Stat. § 83-1,126 (Reissue 2008); *Poindexter v. Houston*, 275 Neb. 863, 750 N.W.2d 688 (2008).

error resulting from a failure to give credit for time served on his sentence for use of a firearm to commit a felony. We therefore affirmed his convictions but vacated the firearm sentence and remanded the cause with directions to resentence Mantich, giving him credit for time served.[5]

2. Postconviction Proceedings

Mantich filed a pro se motion for postconviction relief on September 25, 2006. The court dismissed the first five grounds of the motion, reasoning they were the same grounds Mantich raised on direct appeal. The court did not dismiss Mantich's claim of ineffective assistance of counsel and appointed counsel to represent Mantich with respect to that claim. That attorney filed the operative amended motion for postconviction relief on August 31, 2010.

The amended motion asserted Mantich's sentence of life imprisonment without parole violated the Eighth Amendment because it was (1) categorically prohibited under *Graham v. Florida*[6] and (2) disproportionate to the offense for which he was convicted. In *Graham*,[7] the U.S. Supreme Court held that "the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile nonhomicide offender." The amended motion also alleged the attorney who represented Mantich during trial and on direct appeal was ineffective for not objecting to the life imprisonment without parole sentence on Eighth Amendment grounds.

The State moved to dismiss Mantich's amended motion, asserting *Graham* did not apply because Mantich was convicted of a homicide offense. The State further contended that Mantich's counsel was not ineffective.

On March 17, 2011, the district court denied Mantich's amended motion without an evidentiary hearing. The court concluded that Mantich's life imprisonment sentence was not categorically barred under *Graham* or any decision of this court. Mantich filed this timely appeal. While it was pending,

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[5] See *Mantich, supra* note 1.

[6] *Graham, supra* note 2.

[7] *Id.*, 560 U.S. at 75.

the U.S. Supreme Court decided *Miller v. Alabama*.[8] *Miller* held that a sentence of mandatory life imprisonment without parole for a juvenile violated the Eighth Amendment's prohibition on cruel and unusual punishment. We ordered reargument and supplemental briefing on the effect of *Miller* on Mantich's postconviction motion.

II. ASSIGNMENTS OF ERROR

In the original appeal from the denial of postconviction relief, Mantich assigned, restated and summarized, that the district court erred in (1) failing to vacate his sentence pursuant to the holding of *Graham*, (2) failing to vacate his sentence as unconstitutionally disproportionate to the offense of felony murder, and (3) failing to hold an evidentiary hearing on the issues presented by his ineffective assistance of counsel and Eighth Amendment claims. After we ordered supplemental briefing in light of *Miller*, Mantich reasserted all of the assignments of error raised in his initial brief. He also assigned, restated and consolidated, that his life imprisonment sentence is a violation of the 8th and 14th Amendments based on the U.S. Supreme Court's decision in *Miller.*

III. STANDARD OF REVIEW

[1,2] Whether a sentence violates the Eighth Amendment's cruel and unusual punishment clause presents a question of law.[9] When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.[10]

IV. ANALYSIS

1. *Miller v. Alabama* Applies to Mantich

In *Miller v. Alabama*,[11] the Court held that the "Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders."

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[8] *Miller, supra* note 3.

[9] See *State v. Hurbenca*, 266 Neb. 853, 669 N.W.2d 668 (2003).

[10] *State v. Sims*, 277 Neb. 192, 761 N.W.2d 527 (2009); *State v. Davis*, 276 Neb. 755, 757 N.W.2d 367 (2008).

[11] *Miller, supra* note 3, 132 S. Ct. at 2469.

The Court reached its conclusion by applying two lines of precedent. First, the Court recognized two previous juvenile cases, *Graham v. Florida*[12] and *Roper v. Simmons*.[13] *Graham* held that a juvenile could not be sentenced to life imprisonment without parole for a nonhomicide offense. *Roper* held that a juvenile could not be sentenced to death. Both thus announced categorical bans on sentencing practices as they apply to juveniles. The Court in *Miller* reasoned that *Graham* and *Roper* established that "children are constitutionally different from adults for purposes of sentencing."[14] Specifically, the Court in *Miller* noted that compared to adults, children lack maturity and have an underdeveloped sense of responsibility, are more vulnerable to outside influences and pressures, and have yet to fully develop their character. Because of these differences, the Court reasoned juveniles have "diminished culpability and greater prospects for reform."[15]

Second, the *Miller* Court recognized prior Court jurisprudence requiring individualized decisionmaking in capital punishment cases.[16] It then applied this jurisprudence to the imposition of life imprisonment on juveniles by reasoning that a life imprisonment without parole sentence for a juvenile is tantamount to a death sentence for an adult.[17] According to the Court, because the Eighth Amendment when applied to adults requires individualized sentencing prior to the imposition of a death sentence, the Eighth Amendment when applied to juveniles requires individualized sentencing prior to the imposition of a sentence of life imprisonment without parole.[18]

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[12] *Graham*, *supra* note 2.

[13] *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

[14] *Miller*, *supra* note 3, 132 S. Ct. at 2464.

[15] *Id*.

[16] *Miller*, *supra* note 3. See, *Sumner v. Shuman*, 483 U.S. 66, 107 S. Ct. 2716, 97 L. Ed. 2d 56 (1987); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982); *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976).

[17] *Miller*, *supra* note 3.

[18] *Id*.

The threshold question presented to us in this appeal is whether the holding in *Miller* applies to Mantich so that his sentence must be vacated and this cause remanded for a new sentencing hearing. We held in *State v. Castaneda*[19] that life imprisonment sentences imposed on juveniles in Nebraska prior to *Miller* were mandatory sentences and were equivalent to life imprisonment without parole. But Mantich's life imprisonment sentence was imposed and his first degree murder conviction became final years before *Miller* was decided. He is entitled to be resentenced only if the rule announced in *Miller* applies retroactively to cases that became final prior to its pronouncement, i.e., cases on collateral review.

(a) Retroactivity Test

In its 1989 decision in *Teague v. Lane*,[20] the U.S. Supreme Court set forth a test for determining when a new rule of constitutional law will be applied to cases on collateral review. Before announcing the test, however, the Court emphasized that "the question 'whether a decision [announcing a new rule should] be given prospective or retroactive effect should be faced at the time of [that] decision.'"[21] The Court explained that "[r]etroactivity is properly treated as a threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated."[22]

According to *Teague*, "new rules should always be applied retroactively to cases on direct review, but . . . generally they should not be applied retroactively to criminal cases on collateral review."[23] The rationale for the distinction is that collateral review is not designed as a substitute for direct review and that

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[19] *State v. Castaneda, ante* p. 289, 842 N.W.2d 740 (2014).

[20] *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).

[21] *Id.*, 489 U.S. at 300, quoting Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56 (1965).

[22] *Teague, supra* note 20, 489 U.S. at 300.

[23] *Id.*, 489 U.S. at 303.

the government has a legitimate interest in having judgments become and remain final.[24]

Teague articulated two exceptions to the general rule of nonretroactivity for cases on collateral review. First, a new rule should be applied retroactively if it "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'"[25] Second, a new rule should be applied retroactively if it "requires the observance of 'those procedures that . . . are "implicit in the concept of ordered liberty."'"[26] The ultimate holding in *Teague* was this: "Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."[27]

[3] Since *Teague*, the Court has refined the retroactivity analysis. The most significant refinement occurred in *Schriro v. Summerlin*.[28] The issue in *Schriro* was whether the Court's decision in *Ring v. Arizona*[29] applied retroactively to a death penalty case on federal habeas review. In deciding this, the Court stated:

> When a decision of this Court results in a "new rule," that rule applies to all criminal cases still pending on direct review. . . . As to convictions that are already final, however, the rule applies only in limited circumstances. New *substantive* rules generally apply retroactively. This includes decisions that narrow the scope of a criminal

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[24] See *Teague*, *supra* note 20.

[25] *Id.*, 489 U.S. at 307, quoting *Mackey v. United States*, 401 U.S. 667, 91 S. Ct. 1160, 28 L. Ed. 2d 404 (1971) (Harlan, J., concurring in part, and in part dissenting).

[26] *Id.*, quoting *Mackey*, *supra* note 25 (quoting *Palko v. Connecticut*, 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 2d 288 (1937), *overruled on other grounds*, *Benton v. Maryland*, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969)).

[27] *Teague*, *supra* note 20, 489 U.S. at 310.

[28] *Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004).

[29] *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

> statute by interpreting its terms, . . . as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish. . . . Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal'" or faces a punishment that the law cannot impose upon him.[30]

The Court explained that although it had sometimes referred to rules of this type as "falling under an exception to *Teague*'s bar on retroactive application of procedural rules, . . . they are more accurately characterized as substantive rules not subject to the bar."[31]

[4] *Schriro* further explained that new "rules of procedure" generally do not apply retroactively.[32] The only exception is those rules that are "'"watershed rules of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding.'"[33] This class of rules is extremely narrow.[34]

In 2008, the U.S. Supreme Court ruled that the *Teague*/*Schriro* retroactivity analysis it applies in federal habeas actions is not binding upon state courts when deciding issues of retroactivity under state law.[35] In doing so, the Court noted that a state court is "'free to choose the degree of retroactivity or prospectivity which [it] believe[s] appropriate to the particular rule under consideration, so long as [it] give[s] federal constitutional rights at least as broad a scope as the United States Supreme Court requires.'"[36] In other words, states can

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[30] *Schriro, supra* note 28, 542 U.S. at 351-52 (citations omitted).

[31] *Id.*, 542 U.S. at 352 n.4 (citations omitted).

[32] *Id.*, 542 U.S. at 352.

[33] *Id.*

[34] *Id.*

[35] *Danforth v. Minnesota*, 552 U.S. 264, 128 S. Ct. 1029, 169 L. Ed. 2d 859 (2008).

[36] *Id.*, 552 U.S. at 276, quoting *State v. Fair*, 263 Or. 383, 502 P.2d 1150 (1972).

give broader effect to new rules than is required by the *Teague*/*Schriro* test.[37]

We have adhered to the *Teague*/*Schriro* test in the two cases in which we have addressed the retroactivity of a new rule announced by the U.S. Supreme Court to cases on state postconviction review,[38] and we see no reason to depart from that analysis.

(b) Court Precedent

It is very clear that *Miller* announced a new rule. This is so because the rule announced in *Miller* was not dictated by precedent existing at the time Mantich's first degree murder conviction became final.[39] The new rule can apply to Mantich, who is before this court on collateral review, if it is either a substantive rule or a watershed rule of criminal procedure.[40]

According to *Schriro*, the key distinction in the retroactivity analysis is whether the new rule is substantive or procedural.[41] *Schriro* held that substantive rules *include* those that (1) narrow the scope of a criminal statute by interpreting its terms or (2) place particular conduct or persons covered by the statute beyond the State's power to punish. The second category encompasses "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense."[42] Substantive rules apply retroactively because they carry a "'significant risk'" that a defendant stands convicted

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[37] *Danforth, supra* note 35.

[38] *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003); *State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359 (1990), *cert. granted and judgment vacated* 498 U.S. 964, 111 S. Ct. 425, 112 L. Ed. 2d 409 (1990).

[39] See *Whorton v. Bockting*, 549 U.S. 406, 127 S. Ct. 1173, 167 L. Ed. 2d 1 (2007).

[40] *Id.*; *Schriro, supra* note 28.

[41] *Schriro, supra* note 28.

[42] *Penry v. Lynaugh*, 492 U.S. 302, 330, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989), *abrogated on other grounds, Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).

of "'"an act that the law does not make criminal"'" or "faces a punishment that the law cannot impose upon him."[43]

It is clear that categorical bans on sentences are substantive rules.[44] Rules forbidding imposition of the death sentence on persons with mental retardation[45] or on juveniles[46] and a rule forbidding life imprisonment for a juvenile convicted of a nonhomicide offense[47] have been considered substantive rules.[48]

In comparison, rules that "regulate only the *manner of determining* the defendant's culpability are procedural."[49] They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise.[50]

In the sentencing context, the Court has found a number of rules to be procedural. In *Schriro v. Summerlin*,[51] the Court addressed whether the rule announced in *Ring v. Arizona*[52] applied retroactively to cases on collateral review. *Ring* held that a jury, and not a judge, had to find an aggravating circumstance necessary for imposition of the death penalty. *Schriro* held this rule was procedural, noting it merely "altered the range of permissible methods for determining whether a

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[43] *Schriro, supra* note 28, 542 U.S. at 352, quoting *Bousley v. United States*, 523 U.S. 614, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998).

[44] See *Penry, supra* note 42.

[45] *Atkins, supra* note 42.

[46] *Roper, supra* note 13.

[47] *Graham, supra* note 2.

[48] See, e.g., *Allen v. Buss*, 558 F.3d 657 (7th Cir. 2009) (*Atkins*); *Nixon v. State*, 2 So. 3d 137 (Fla. 2009) (*Atkins*); *McStoots v. Com.*, 245 S.W.3d 790 (Ky. App. 2007) (*Roper*); *Duncan v. State*, 925 So. 2d 245 (Ala. Crim. App. 2005) (*Roper*); *People v. Rainer*, No. 10CA2414, 2013 WL 1490107 (Colo. App. Apr. 11, 2013) (*Graham*); *Bonilla v. State*, 791 N.W.2d 697 (Iowa 2010) (*Graham*).

[49] *Schriro, supra* note 28, 542 U.S. at 353.

[50] *Schriro, supra* note 28.

[51] *Id.*

[52] *Ring, supra* note 29.

defendant's conduct is punishable by death."[53] It noted that rules that "allocate decisionmaking authority in this fashion are prototypical procedural rules."[54] Notably, however, the Court stated:

> This Court's holding that, *because* [a state] has made a certain fact essential to the death penalty, that fact must be found by a jury, is not the same as *this Court's* making a certain fact essential to the death penalty. The former was a procedural holding; the latter would be substantive.[55]

In *Lambrix v. Singletary*,[56] the Court addressed whether the rule announced in *Espinosa v. Florida*[57] applied retroactively to cases on collateral review. *Espinosa* held that if a sentencing judge in a state that requires specified aggravating circumstances to be weighed against any mitigating circumstances at the sentencing phase of a capital trial is required to give deference to a jury's advisory sentencing recommendation, then neither the jury nor the judge is constitutionally permitted to weigh invalid aggravating circumstances. Without extensive analysis, the *Lambrix* Court concluded this rule did not prohibit the imposition of capital punishment on a particular class of persons.

In *Sawyer v. Smith*,[58] the Court addressed whether the rule announced in *Caldwell v. Mississippi*[59] applied retroactively to cases on collateral review. *Caldwell* held that the Eighth Amendment prohibits imposition of the death penalty by a sentencer that has been led to the false belief that the responsibility for determining the appropriateness of the sentence rests

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[53] *Schriro, supra* note 28, 542 U.S. at 353.

[54] *Id.*

[55] *Id.*, 542 U.S. at 354.

[56] *Lambrix v. Singletary*, 520 U.S. 518, 117 S. Ct. 1517, 137 L. Ed. 2d 771 (1997).

[57] *Espinosa v. Florida*, 505 U.S. 1079, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992).

[58] *Sawyer v. Smith*, 497 U.S. 227, 110 S. Ct. 2822, 111 L. Ed. 2d 193 (1990).

[59] *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985).

elsewhere. The *Sawyer* Court concluded the rule was not retroactive, because it was simply a procedural rule "designed as an enhancement of the accuracy of capital sentencing."[60]

(c) *Miller* and Other Jurisdictions

A number of jurisdictions have considered whether *Miller* announced a rule that is to be applied retroactively. The results are varied. The primary point of dissension is whether the rule announced in *Miller* is substantive.

The Louisiana Supreme Court held in *State v. Tate*[61] that the rule announced in *Miller* was a procedural one, largely because the Court in *Miller* specifically stated that "'[o]ur decision does not categorically bar a penalty for a class of offenders or type of crime.'" Louisiana reasoned that *Miller* simply "altered the range of **permissible methods**" for determining whether a juvenile could be sentenced to life imprisonment without parole.[62] In *Com. v. Cunningham*[63] the Pennsylvania Supreme Court adopted similar reasoning, holding that "by its own terms, the *Miller* holding 'does not categorically bar a penalty for a class of offenders.'" A U.S. district court in Virginia has also adopted this rationale.[64]

The Minnesota Supreme Court held in *Chambers v. State*[65] that the rule announced in *Miller* was procedural and not substantive because it did not "eliminate the power of the State to impose the punishment of life imprisonment without the possibility of release upon a juvenile offender who has committed a homicide offense." Instead, it reasoned that *Miller* simply requires "'that a sentencer follow *a certain process*—considering an offender's youth and attendant

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[60] *Sawyer, supra* note 58, 497 U.S. at 244.

[61] *State v. Tate*, No. 2012-OK-2763, 2013 WL 5912118 at *6 (La. Nov. 5, 2013), quoting *Miller, supra* note 3.

[62] *Id.*

[63] *Com. v. Cunningham*, 81 A.3d 1, 10 (Pa. 2013), quoting *Miller, supra* note 3.

[64] *Johnson v. Ponton*, No. 3:13-CV-404, 2013 WL 5663068 (E.D. Va. Oct. 16, 2013) (memorandum opinion).

[65] *Chambers v. State*, 831 N.W.2d 311, 328 (Minn. 2013).

characteristics—before imposing'" a sentence of life imprisonment without parole.[66] The U.S. Court of Appeals for the 11th and 5th Circuits and the Michigan Court of Appeals have all adopted similar reasoning.[67] The 11th Circuit placed particular reliance on *Penry v. Lynaugh*.[68] In *Penry*, the Court held that a new rule "prohibiting a certain category of punishment for a class of defendants because of their status or offense" is retroactive, but only where a class cannot be subjected to the punishment "regardless of the procedures followed."[69] The 11th Circuit reasoned that *Miller* is not substantive, because it merely altered the range of permissible methods for determining whether a juvenile's conduct is punishable by life imprisonment without parole and did not completely forbid a jurisdiction from imposing a sentence of life imprisonment without parole.[70]

But at least four jurisdictions have reasoned that the rule announced in *Miller* is a substantive one, largely because it fits into the second category of substantive rules announced in *Schriro*. The Illinois Court of Appeals held in *People v. Morfin*[71] that *Miller* was a substantive rule because it "mandates a sentencing range broader than that provided by statute for minors convicted of first degree murder." A concurring opinion emphasized that the rule was substantive because *Miller* forbids an entire category of sentence—a mandatory sentence of life imprisonment for juveniles.[72] The concurrence also reasoned that a new rule that did not prohibit a certain sentence in every case but prohibited the mandatory

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[66] *Id.*, quoting *Miller, supra* note 3.

[67] See *In re Morgan*, 717 F.3d 1186 (11th Cir. 2013) (en banc); *Craig v. Cain*, No. 12-30035, 2013 WL 69128 (5th Cir. Jan. 4, 2013) (unpublished opinion); and *People v. Carp*, 298 Mich. App. 472, 828 N.W.2d 685 (2012).

[68] *Penry, supra* note 42.

[69] *Id.*, 492 U.S. at 330.

[70] *In re Morgan, supra* note 67.

[71] *People v. Morfin*, 2012 IL App (1st) 103568, ¶ 56, 981 N.E.2d 1010, 1022, 367 Ill. Dec. 282, 294 (2012).

[72] *Morfin, supra* note 71 (Sterba, J., specially concurring).

imposition of that sentence was a substantive rule and not a procedural one.[73] Similarly, in *Jones v. Mississippi*,[74] the Supreme Court of Mississippi reasoned that *Miller* was a substantive rule because it "explicitly foreclosed imposition of a *mandatory* sentence of life without parole on juvenile offenders." It further reasoned that *Miller* required a substantive change in Mississippi law, because it required legislative modification of the existing law that had no provision for following the dictates of *Miller*. Very recently, the Supreme Judicial Court of Massachusetts held the *Miller* rule was substantive because it "forecloses the imposition of a certain category of punishment—mandatory life in prison without the possibility of parole—on a specific class of defendants."[75] And the Supreme Court of Iowa in *State v. Ragland*[76] recently held:

> From a broad perspective, *Miller* does mandate a new procedure. Yet, the procedural rule for [an individualized sentencing] hearing is the result of a substantive change in the law that prohibits mandatory life-without-parole sentencing. Thus, the case bars states from imposing a certain type of punishment on certain people. . . . "Such rules apply retroactively because they 'necessarily carry a significant risk that a defendant' . . . faces a punishment that the law cannot impose upon him."

The Iowa Supreme Court also emphasized an article written by constitutional scholar Erwin Chemerinsky in which he stated:

> "There is a strong argument that *Miller* should apply retroactively: It says that it is beyond the authority of the criminal law to impose a mandatory sentence of life without parole. It would be terribly unfair to have individuals imprisoned for life without any chance of parole based on the accident of the timing of the trial.

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[73] *Id.*

[74] *Jones v. Mississippi*, 122 So. 3d 698, 702 (Miss. 2013).

[75] *Diatchenko v. District Attorney for Suffolk Dist.*, 466 Mass. 655, 666, 1 N.E.3d 270, 281 (2013).

[76] *State v. Ragland*, 836 N.W.2d 107, 115-16 (Iowa 2013), quoting *Schriro*, *supra* note 28.

> ". . . .
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> ". . . [T]he *Miller* Court did more than change procedures; it held that the government cannot constitutionally impose a punishment. As a substantive change in the law which puts matters outside the scope of the government's power, the holding should apply retroactively."[77]

Courts have also reached differing conclusions as to how the procedural posture of *Miller* affects the retroactivity analysis. *Miller* involved two defendants who were before the Court in separate but consolidated cases. Defendant Evan Miller was before the Court after his direct appeal from his criminal conviction was denied.[78] But the other defendant, Kuntrell Jackson, was before the Court on collateral review; he sought relief after a state court dismissed his application for a writ of state habeas corpus.[79] In announcing the new rule in *Miller*, the Court made no distinction between the procedural postures of the two defendants. Instead, it simply reversed both of the lower court judgments and remanded the causes "for further proceedings not inconsistent with this opinion."[80]

At least three jurisdictions have reasoned that the Court's equal treatment of the two defendants is a factor that must be considered in the retroactivity analysis. In *Ragland*, the Iowa Supreme Court noted that Jackson's case was remanded so that Jackson could be given an individualized sentencing hearing and reasoned that "[t]here would have been no reason for the Court to direct such an outcome if it did not view the *Miller* rule as applying retroactively to cases on collateral review."[81] *Ragland* also noted that the dissent in *Miller*

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[77] *Ragland*, *supra* note 76, 836 N.W.2d at 117, quoting Erwin Chemerinsky, *Chemerinsky: Juvenile Life-Without-Parole Case Means Courts Must Look at Mandatory Sentences*, A.B.A. J. Law News Now (posted Aug. 8, 2012), http://www.abajournal.com/news/article/chemerinsky_juvenile_life-without-parole_case_means_courts_must_look_at_sen/.

[78] See *Miller, supra* note 3.

[79] *Id.*

[80] *Miller, supra* note 3, 132 S. Ct. at 2475.

[81] *Ragland*, *supra* note 76, 836 N.W.2d at 116.

suggested the majority's decision would invalidate other cases across the nation and reasoned that the dissent would not have raised such a concern if the Court did not intend its holding to apply to cases on collateral review. In *People v. Williams*,[82] an Illinois appellate court found it "instructive" that the Court applied the *Miller* rule to Jackson when he was before the Court on collateral review. And another Illinois appellate court noted the "relief granted to Jackson in *Miller* tends to indicate that *Miller* should apply retroactively on collateral review."[83] Most recently, in *Diatchenko v. District Attorney for Suffolk Dist.*,[84] the highest court in Massachusetts reasoned that because the Court applied the rule to Jackson, "evenhanded justice requires that it be applied retroactively to all who are similarly situated."

Other jurisdictions, however, conclude the Court's treatment of Jackson is not a relevant factor in the retroactivity analysis. In *Com. v. Cunningham*,[85] the Pennsylvania Supreme Court noted that it was not clear the retroactivity issue was before the Court with respect to Jackson and that in the absence of a "specific, principled retroactivity analysis" by the Court, it would not deem the Court to have held the *Miller* rule applied retroactively just because the Court applied it to Jackson. Similarly, in *People v. Carp*,[86] the Michigan Court of Appeals reasoned that the "mere fact that the Court remanded Jackson for resentencing does not constitute a ruling or determination on retroactivity." *Carp* further reasoned that the issue of retroactivity was not raised as to Jackson and that thus, the Court had no reason to address it.

A federal district court in Virginia has taken a slightly different approach. In *Johnson v. Ponton*,[87] the court reasoned

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[82] *People v. Williams*, 2012 IL App (1st) 111145, ¶ 54, 982 N.E.2d 181, 197, 367 Ill. Dec. 503, 519 (2012).

[83] *Morfin*, *supra* note 71, ¶ 57, 981 N.E.2d at 1023, 367 Ill. Dec. at 295.

[84] *Diatchenko*, *supra* note 75, 466 Mass. at 667, 1 N.E.3d at 282.

[85] *Cunningham*, *supra* note 63, 81 A.3d at 9.

[86] *Carp*, *supra* note 67, 298 Mich. App. at 518, 828 N.W.2d at 712.

[87] *Johnson*, *supra* note 64.

that although the U.S. Supreme Court stated in *Teague v. Lane*[88] that the retroactivity analysis is a threshold question and a prerequisite for announcement of a new constitutional rule, it has forgone this analysis in at least one recent case. Specifically, in *Padilla v. Kentucky*,[89] a petitioner brought a collateral challenge to his conviction. In deciding *Padilla*, the Court announced a new constitutional rule and applied it to the defendant before it, but did not engage in a retroactivity analysis. Later, in *Chaidez v. U.S.*,[90] the Court expressly held that the rule it announced in *Padilla* did not apply retroactively to other cases on collateral review. Based on the Court's actions in *Padilla* and *Chaidez*, the court in *Johnson* reasoned that the Court's application of the *Miller* rule to Jackson was not dispositive of its intent to apply the *Miller* rule to all cases on collateral review.

(d) Resolution

Under the *Teague*/*Schriro* retroactivity analysis, the distinction between substance and procedure is important. But how the rule announced in *Miller* should be categorized is difficult, because it does not neatly fall into the existing definitions of either a procedural rule or a substantive rule.

As other courts have noted, the *Miller* rule certainly contains a procedural component, because it specifically requires that a sentencer follow a certain process before imposing the sentence of life imprisonment on a juvenile.[91] And unlike the holdings in *Graham v. Florida*[92] and *Roper v. Simmons*,[93] the *Miller* rule does not categorically bar a specific punishment; a State may still constitutionally sentence a juvenile to life imprisonment without parole under *Miller*.

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[88] *Teague*, *supra* note 20.

[89] *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010).

[90] *Chaidez v. U.S.*, ___ U.S. ___, 133 S. Ct. 1103, 185 L. Ed. 2d 149 (2013).

[91] See, *In re Morgan*, *supra* note 67; *Tate*, *supra* note 61; *Chambers*, *supra* note 65; *Cunningham*, *supra* note 63.

[92] *Graham*, *supra* note 2.

[93] *Roper*, *supra* note 13.

But at the same time, the *Miller* rule includes a substantive component. *Miller* did not simply change what entity considered the same facts.[94] And *Miller* did not simply announce a rule that was designed to enhance accuracy in sentencing.[95] Instead, *Miller* held that a sentencer must consider specific, individualized factors before handing down a sentence of life imprisonment without parole for a juvenile. Effectively, then, *Miller* required a sentencer of a juvenile to consider new facts, i.e., mitigation evidence, before imposing a life imprisonment sentence with no possibility of parole. In our view, this approaches what the Court itself held in *Schriro* would amount to a new substantive rule: The Court made a certain fact (consideration of mitigating evidence) essential to imposition of a sentence of life imprisonment without parole.[96] In other words, it imposed a new requirement as to what a sentencer must consider in order to constitutionally impose life imprisonment without parole on a juvenile.

And *Miller* itself recognized that when mitigating evidence is considered, a sentence of life imprisonment without parole for a juvenile should be rare. This is consistent with the underlying logic of *Miller*, based on *Graham*, that "'[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'"[97] In essence, *Miller* "amounts to something close to a de facto substantive holding,"[98] because it sets forth the general rule that life imprisonment without parole should not be imposed upon a juvenile except in the rarest of cases where that juvenile cannot be distinguished from an adult based on diminished capacity or culpability.

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[94] Compare *Ring, supra* note 29.

[95] Compare *Caldwell, supra* note 59.

[96] *Schriro, supra* note 28.

[97] *Graham, supra* note 2, 560 U.S. at 73, quoting *Roper, supra* note 13.

[98] *The Supreme Court, 2011 Term—Leading Cases*, 126 Harv. L. Rev. 276, 286 (2012).

The substantive aspect of the *Miller* rule is also evident when considered in light of the effect of *Miller* on existing Nebraska law. In response to *Miller*, the Nebraska Legislature amended the sentencing laws for juveniles convicted of first degree murder.[99] The amendments changed the possible penalty for a juvenile convicted of first degree murder from a mandatory sentence of life imprisonment to a "maximum sentence of not greater than life imprisonment and a minimum sentence of not less than forty years' imprisonment."[100] The Legislature also mandated that in determining the sentence for a juvenile convicted of first degree murder, the sentencing judge "shall consider mitigating factors which led to the commission of the offense."[101] A juvenile may submit any mitigating factors to the sentencer, including, but not limited to, age at the time of the offense, degree of impetuosity, family and community environment, ability to appreciate the risks and consequences of the conduct, intellectual capacity, and the results of a mental health evaluation.[102] We view these as substantive changes to Nebraska law and requirements that sentencers consider new facts prior to sentencing a juvenile convicted of first degree murder. Most specifically, the fact that *Miller* required Nebraska to change its substantive punishment for the crime of first degree murder when committed by a juvenile from a mandatory sentence of life imprisonment to a sentence of 40 years' to life imprisonment demonstrates the rule announced in *Miller* is a substantive change in the law.

Moreover, the entire rationale of *Miller* is that when a sentencing scheme fails to give a sentencer a choice between life imprisonment without parole and something lesser, the scheme is necessarily cruel and unusual. Here, it is undisputed that Mantich's sentencer was denied that choice, and it

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[99] 2013 Neb. Laws, L.B. 44 (codified at Neb. Rev. Stat. § 28-105.02 (Supp. 2013)).

[100] § 28-105.02(1).

[101] § 28-105.02(2).

[102] *Id.*

is the absence of that choice that makes the *Miller* rule more substantive than procedural. Further, we agree that the *Miller* rule is entirely substantive when viewed as Massachusetts, Mississippi, and Illinois have—as a categorical ban on the imposition of a mandatory sentence of life imprisonment without parole for juveniles.[103]

We also find it noteworthy that the Court applied the rule announced in *Miller* to Jackson, who was before the Court on collateral review. Years ago, the Court stated that it would not announce or apply a new constitutional rule in a case before it on collateral review unless that rule would apply to all defendants on collateral review.[104] The Court specifically adopted this policy in order to ensure that justice is administered evenhandedly.[105] Although we recognize that the Court has strayed from this policy on one recent occasion,[106] we are not inclined to refuse to apply the rule announced in *Miller* to a defendant before us on collateral review when the Court has already applied the rule to a defendant before it on collateral review. Evenhanded administration of justice is carried out only if Mantich, like Jackson, is entitled to the benefit of the new rule announced in *Miller*.[107] As noted by the Supreme Court of Iowa, any other result would be "'terribly unfair.'"[108]

[5] Because the rule announced in *Miller* is more substantive than procedural and because the Court has already applied that rule to a case on collateral review, we conclude that the rule announced in *Miller* applies retroactively to Mantich. Mantich's life imprisonment sentence must be vacated, and the cause remanded for resentencing under § 28-105.02.

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[103] See, *Diatchenko, supra* note 75; *Jones, supra* note 74; *Morfin, supra* note 71.

[104] *Penry, supra* note 42; *Teague, supra* note 20.

[105] *Id.*

[106] See *Padilla, supra* note 89.

[107] See *Diatchenko, supra* note 75.

[108] *Ragland, supra* note 76, 836 N.W.2d at 117, quoting Chemerinsky, *supra* note 77.

2. Other Claims

In Mantich's original appeal, he argued that his sentence of life imprisonment without parole was categorically invalid under *Graham v. Florida*.[109] *Graham* held that a juvenile convicted of a nonhomicide offense cannot be sentenced to life imprisonment without parole. Mantich invites us to extend this holding to a juvenile convicted of felony murder.

Because we find Mantich is entitled to be resentenced under the dictates of *Miller*, we do not reach this argument in this appeal. If Mantich, on remand, is resentenced to life imprisonment with no minimum term which permits parole eligibility, he may raise the *Graham* argument in an appeal from that sentence.

Likewise, in view of our disposition, we need not reach Mantich's claim that his counsel was ineffective in failing to assert an Eighth Amendment challenge at his original sentencing and on direct appeal.

V. CONCLUSION

The rule announced in *Miller* applies retroactively to Mantich. We remand the cause with directions to grant postconviction relief by vacating his life imprisonment sentence and resentencing him pursuant to § 28-105.02.[110]

Sentence vacated, and cause remanded for resentencing.

[109] *Graham*, *supra* note 2.

[110] See *Castaneda*, *supra* note 19.

Cassel, J., dissenting.

I respectfully dissent. First, I believe the rule from *Miller v. Alabama*[1] is a procedural rule that should not be applied retroactively on collateral review. Second, I would find Mantich's other claimed errors to be without merit. Thus, I would affirm the decision of the district court.

[1] *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

RETROACTIVITY OF *MILLER V. ALABAMA*

As the majority observed, the rule announced in *Miller* does not fall conveniently into the existing definitions of either a procedural rule or a substantive rule. But I believe the better approach would be to join the majority of jurisdictions that have ruled on this issue and conclude that the rule announced in *Miller* is a procedural one.[2]

Unlike the rules announced in *Graham v. Florida*[3] and *Roper v. Simmons*,[4] *Miller* did not categorically bar a specific punishment. The *Miller* Court specifically noted that its decision "mandate[d] only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty."[5] *Miller* simply does not fall into the narrow category of a substantive rule, because no juvenile sentenced to life imprisonment without parole in Nebraska "faces a punishment that the law cannot impose upon him."[6] Although the process by which a juvenile may be sentenced to life imprisonment without parole now changes based upon *Miller*, the ultimate sentence of life imprisonment without parole for a juvenile is still a legitimate sentence. The U.S. Supreme Court has never indicated that anything less than a full categorical ban on a sentence may be

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[2] See, *In re Morgan*, 717 F.3d 1186 (11th Cir. 2013) (en banc); *Holland v. Hobbs*, No. 5:12CV00463-SWW-JJV, 2013 WL 6332731 (E.D. Ark. Dec. 5, 2013); *Johnson v. Ponton*, No. 3:13-CV-404, 2013 WL 5663068 (E.D. Va. Oct. 16, 2013) (memorandum opinion); *Geter v. State*, 115 So. 3d 375 (Fla. App. 2012); *State v. Tate*, No. 2012-OK-2763, 2013 WL 5912118 (La. Nov. 5, 2013); *People v. Carp*, 298 Mich. App. 472, 828 N.W.2d 685 (2012); *Chambers v. State*, 831 N.W.2d 311 (Minn. 2013); *Com. v. Cunningham*, 81 A.3d 1 (Pa. 2013); *Craig v. Cain*, No. 12-30035, 2013 WL 69128 (5th Cir. Jan. 4, 2013) (unpublished opinion).

[3] *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).

[4] *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

[5] *Miller, supra* note 1, 132 S. Ct. at 2471.

[6] *Schriro v. Summerlin*, 542 U.S. 348, 352, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004).

a new substantive rule, and in my view, we should decline to do so in the first instance.

I am not persuaded that the U.S. Supreme Court established a precedent of retroactive application of the *Miller* rule simply by applying the rule to a defendant before it on collateral review. A new rule is not made retroactive to cases on collateral review unless the Court holds it to be retroactive.[7] And a state can waive the *Teague v. Lane*[8] retroactivity bar by not raising it.[9] The Court likely did not address the retroactivity issue in *Miller* because the State of Arkansas did not argue that any new rule announced would not apply to Jackson, who was before the Court on collateral review. I do not believe that we should interpret silence as an affirmative holding that the *Miller* rule is to apply retroactively to defendants on collateral review. Further, I find it persuasive that the Court has recently demonstrated in *Padilla v. Kentucky*[10] and *Chaidez v. U.S.*[11] that its announcement of a new constitutional rule in a case before it on collateral review is not a determination of whether that rule should apply to all cases on collateral review.

In my view, the rule announced in *Miller* is not a "'"watershed rule[] of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding.'"[12] To qualify as a watershed rule, a new rule must both be necessary to prevent an impermissibly large risk of an inaccurate conviction and alter our understanding of the bedrock procedural principles essential to the fairness of a proceeding.[13] The Court has repeatedly emphasized that the watershed exception is

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[7] *Tyler v. Cain*, 533 U.S. 656, 121 S. Ct. 2478, 150 L. Ed. 2d 632 (2001).

[8] *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).

[9] *Schiro v. Farley*, 510 U.S. 222, 114 S. Ct. 783, 127 L. Ed. 2d 47 (1994).

[10] *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010).

[11] *Chaidez v. U.S.*, ___ U.S. ___, 133 S. Ct. 1103, 185 L. Ed. 2d 149 (2013).

[12] *Schriro, supra* note 6, 542 U.S. at 355.

[13] *Whorton v. Bockting*, 549 U.S. 406, 127 S. Ct. 1173, 167 L. Ed. 2d 1 (2007).

extremely narrow and, since *Teague*, has yet to find a new rule that fits within the exception.[14] The only case that has ever satisfied this high threshold is *Gideon v. Wainwright*,[15] in which the Court held that counsel must be appointed for any indigent defendant charged with a felony.

The rule announced in *Miller* relates only to the sentencing stage of a criminal proceeding and, thus, cannot be said to be necessary to prevent an impermissibly large risk of an inaccurate conviction. In addition, it is not a rule announcing a "previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding."[16] While the rule announced in *Miller* was important, it did not effect a sweeping change comparable to *Gideon*. These reasons further support not applying the rule announced in *Miller* retroactively to Mantich on collateral review.

Our judicial process favors the finality of judgments. As noted by the majority, Mantich's life imprisonment sentence was imposed and became final long before the decision in *Miller* was announced. There is an important interest in the finality of judgments that must be respected. I agree with the assessment of another court that "applying *Miller* retroactively 'would undermine the perceived and actual finality of criminal judgments and would consume immense judicial resources without any corresponding benefit to the accuracy or reliability of the [underlying criminal case].'"[17]

At least to a certain degree, some of the minority of courts addressing whether the *Miller* decision was substantive or procedural have relied upon perceptions of fairness between those whose direct appeals were still pending and those whose cases had already been finally determined. This is a dangerous expansion of the power of judges, because it places no principled limit upon the scope of judicial power. While the distinction between procedural and substantive may be difficult

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[14] *Id.* (citing cases).

[15] *Gideon v. Wainright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963).

[16] *Whorton, supra* note 13, 549 U.S. at 421.

[17] *Geter, supra* note 2, 115 So. 3d at 383-84.

to apply, it affords a principled basis for decision. If a judge allows his or her perceptions of fairness to intrude, the decision ceases to be an application of law and becomes an application of the judge's personal biases and preferences. In my view, the existing legal framework drives the answer to the question before this court and dictates that the change is procedural. As a judge, my role goes no further.

OTHER CLAIMS

Graham v. Florida Argument

In his original appeal, Mantich argued that his sentence of life imprisonment without parole was categorically invalid under *Graham v. Florida*.[18] *Graham* held that a juvenile convicted of a nonhomicide offense cannot be sentenced to life imprisonment without parole. Mantich asked us to extend this holding to a juvenile convicted of felony murder. I would find that Mantich's postconviction claim based on *Graham* is not procedurally barred.

A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, no matter how those issues may be phrased or rephrased.[19] *Graham* was decided in 2010, long after this court affirmed Mantich's conviction and life imprisonment sentence for first degree murder. *Graham* was the first case in which the U.S. Supreme Court imposed a categorical bar on life imprisonment sentences for a specific class of offenders. Mantich could not have asserted his *Graham* claim at trial or on direct appeal, because the Eighth Amendment jurisprudence at that time did not support a categorical bar on life imprisonment sentences.[20] Therefore, it is not procedurally barred and its merits can be addressed.

The issue decided by the U.S. Supreme Court in *Graham* was "whether the Constitution permits a juvenile offender to be sentenced to life in prison without parole for a nonhomicide

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[18] *Graham*, *supra* note 3.

[19] *State v. Boppre*, 280 Neb. 774, 790 N.W.2d 417 (2010).

[20] See *State v. El-Tabech*, 259 Neb. 509, 610 N.W.2d 737 (2000).

crime."[21] The defendant was sentenced to life imprisonment, which carried no possibility of release except through executive clemency.[22] The Court held, as a matter of first impression, that "for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole."[23] The Court specifically limited its holding to "only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense."[24] The Court distinguished homicide cases, noting:

> There is a line "between homicide and other serious violent offenses against the individual." . . . Serious nonhomicide crimes "may be devastating in their harm . . . but 'in terms of moral depravity and of the injury to the person and to the public,' . . . they cannot be compared to murder in their 'severity and irrevocability.'" . . . This is because "[l]ife is over for the victim of the murderer," but for the victim of even a very serious nonhomicide crime, "life . . . is not over and normally is not beyond repair." . . . Although an offense like robbery or rape is "a serious crime deserving serious punishment," . . . those crimes differ from homicide crimes in a moral sense.
>
> It follows that, when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis.[25]

We have considered the scope of *Graham* in one prior case. *State v. Golka*[26] involved a postconviction appeal by an offender who had been sentenced to two consecutive terms of life imprisonment for two first degree murders committed when he was 17 years old. His postconviction motion alleged

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[21] *Graham, supra* note 3, 560 U.S. at 52-53.

[22] *Graham, supra* note 3.

[23] *Id.*, 560 U.S. at 74.

[24] *Id.*, 560 U.S. at 63.

[25] *Id.*, 560 U.S. at 69 (citations omitted).

[26] *State v. Golka*, 281 Neb. 360, 796 N.W.2d 198 (2011).

that the sentences constituted cruel and unusual punishment in violation of the 8th and 14th Amendments to the U.S. Constitution and article I, § 9, of the Nebraska Constitution. That claim was rejected by the district court, and *Graham* was decided during the pendency of the appeal. In affirming the denial of postconviction relief, we agreed with two other state courts which had held that *Graham* does not preclude life imprisonment sentences for juvenile offenders convicted of murder.[27]

Mantich argues that his crime must be considered a "'nonhomicide'" offense under *Graham* because there was no finding at trial or sentencing that he killed or intended to kill Thompson.[28] He argues that he was at most a "minor participant" in the murder.[29] He bases this argument primarily upon *Enmund v. Florida*[30] and *Tison v. Arizona*,[31] both of which were appeals from death sentences. In *Enmund*, the U.S. Supreme Court held that the Eighth Amendment did not permit imposing "the death penalty on [a person] who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed."[32] In *Tison*, the Court held that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement" for imposition of the death penalty.[33] Both *Enmund* and *Tison* addressed the issue of when a murderer's conduct was sufficiently culpable to warrant imposition of the maximum penalty of death. Although the Court in *Graham*

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[27] *Id.* (citing *Jackson v. Norris*, 2011 Ark. 49, 378 S.W.3d 103 (2011), *reversed, Miller, supra* note 1; *State v. Andrews*, 329 S.W.3d 369 (Mo. 2010)).

[28] Brief for appellant at 22.

[29] *Id.* at 21.

[30] *Enmund v. Florida*, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982).

[31] *Tison v. Arizona*, 481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987).

[32] *Enmund*, *supra* note 30, 458 U.S. at 797.

[33] *Tison*, *supra* note 31, 481 U.S. at 158.

cited *Enmund* in support of its reasoning with respect to relative culpability, I do not interpret that citation as permitting a homicide to be considered a "nonhomicide" offense for purposes of sentencing, as Mantich urges.

Admittedly, the reasoning in *Miller v. Alabama*[34] offers some support for Mantich's argument. As noted, in *Miller*, the Court reasoned that because individualized sentencing was required for adults in cases involving imposition of the death penalty, the greatest possible penalty imposed upon an adult, individualized sentencing was also required for juveniles in cases involving imposition of the penalty of life imprisonment without parole, the greatest possible penalty imposed upon a juvenile. Mantich argues that because the Court equated death for adults with life imprisonment for juveniles in one context, all of the Court's previous requirements for constitutional imposition of the death penalty on adults now apply to constitutional imposition of life imprisonment without parole on juveniles. Particularly, he contends that the *Enmund*/*Tison* rationale is now directly applicable to him and that he cannot be sentenced to the greatest possible punishment available because there has been no showing that he killed or intended to kill.

The record contains some evidence concerning intent to kill. During Mantich's sentencing hearing, the court addressed the question of who pulled the trigger and stated:

> You admitted on two separate occasions separated by a month that you in fact fired the shot which killed . . . Thompson.
>
> The admission you made directly after the incident and particularly coupled with the admission to law enforcement personnel a month later with thoughts, feelings, and corroboration which would go along with the murder of someone certainly strongly suggests that you in fact pulled the trigger. The murder of . . . Thompson at point-blank range by putting a gun against his head and firing it is brutal beyond description and cold. . . .

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[34] *Miller, supra* note 1.

> You murdered a blameless person . . . Mantich. One who had every right and expectation to lead his life without being subjected to a mindless, violent death carried out by you.

And on direct appeal, with regard to the insufficient evidence claim, we wrote:

> The facts taken in the light most favorable to the State are such that a finder of fact could conclude beyond a reasonable doubt that Mantich committed murder while aiding and abetting in the kidnapping and robbery of Thompson and used a firearm to commit a felony. There is sufficient evidence to demonstrate that Mantich aided and abetted the kidnapping and robbery perpetrated against Thompson. When Eona and Brunzo left the party and returned with the stolen van, Mantich joined them over the strong objections and physical restraint of his girl friend. Mantich testified that he heard Eona and Brunzo tell Thompson they were going to kill him, and Mantich watched as Eona and Brunzo repeatedly jabbed Thompson in the head with the barrels of their guns. Mantich's statement to police was sufficient to establish that he was handed a gun, placed the gun against the back of Thompson's head, and pulled the trigger.
>
> Even if the jury was uncertain as to whether Mantich actually shot Thompson, the evidence supports the jury's finding that Mantich aided and abetted in the kidnapping and robbery of Thompson. It was undisputed that Thompson was killed by someone in the van while the group was kidnapping, robbing, and terrorizing him. The group forcibly restrained Thompson with the express intent of robbing and terrorizing him. The evidence shows that Mantich encouraged these activities and participated in the verbal terrorization of Thompson. This evidence is sufficient to convict Mantich of felony murder and use of a weapon to commit a felony.[35]

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[35] *State v. Mantich*, 249 Neb. 311, 328-29, 543 N.W.2d 181, 193-94 (1996).

Even if the record did not demonstrate that Mantich either killed or intended to kill, I would not extend the Court's holding in *Graham* to a juvenile convicted of felony murder. At the time Mantich committed his crime, the sentence in Nebraska for first degree murder was either mandatory life imprisonment or death.[36] *Graham* held that the Eighth Amendment prohibited sentencing a juvenile to the maximum penalty of life imprisonment without parole for the nonhomicide offense which the juvenile committed. That is a far different issue than whether the Eighth Amendment prohibits imposing the minimum sentence of life imprisonment without parole on a juvenile who committed first degree murder. As the Court noted in *Graham*, nonhomicide crimes "differ from homicide crimes in a moral sense."[37] I would urge that we join the other jurisdictions which have held that *Graham* has no application to a juvenile convicted of a homicide offense under a felony murder theory.[38]

Unconstitutionally Disproportionate Claim

Unlike Mantich's argument based on *Graham*, his claim that his life imprisonment sentence was unconstitutionally disproportionate to his crime could have been raised at the time of sentencing and on direct appeal. The constitutional principle of proportionality was well established at the time of Mantich's first degree murder conviction.[39] Because the issue was not raised at sentencing or on direct appeal, it is procedurally barred in this postconviction proceeding. However, I will address the merits of the issue in the context of Mantich's claim that his trial and appellate counsel was ineffective in failing to raise it.

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[36] See Neb. Rev. Stat. §§ 28-105 (Reissue 1989) and 28-303 (Reissue 1995).

[37] *Graham*, *supra* note 3, 560 U.S. at 69.

[38] See, *Arrington v. State*, 113 So. 3d 20 (Fla. App. 2012); *Jackson*, *supra* note 27; *Bell v. State*, 2011 Ark. 379, 2011 WL 4396975 (2011) (unpublished opinion).

[39] See, *Solem v. Helm*, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983); *Weems v. United States*, 217 U.S. 349, 30 S. Ct. 544, 54 L. Ed. 793 (1910).

Ineffectiveness of Trial and Appellate Counsel

When a defendant was represented both at trial and on direct appeal by the same lawyers, generally speaking, the defendant's first opportunity to assert an ineffective assistance of trial counsel claim is in a motion for postconviction relief.[40] That is the circumstance here. The record shows that Mantich was represented at trial and on direct appeal by the same attorney. He alleged in his postconviction motion that his counsel was ineffective in failing to argue at sentencing and on direct appeal that a life imprisonment sentence would constitute cruel and unusual punishment.

In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden, in accordance with *Strickland v. Washington*,[41] to show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense.[42] In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.[43] The two prongs of this test, deficient performance and prejudice, may be addressed in either order.[44] The entire ineffectiveness analysis is viewed with the strong presumption that counsel's actions were reasonable.[45] Defense counsel is not ineffective for failing to raise an argument that has no merit.[46] Accordingly, I will examine the merit of Mantich's claim that his life imprisonment sentence is unconstitutionally disproportionate to his crime.

The Eighth Amendment "prohibits not only barbaric punishments, but also sentences that are disproportionate to the

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[40] *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004).

[41] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[42] *State v. McGhee*, 280 Neb. 558, 787 N.W.2d 700 (2010).

[43] *Id.*

[44] *Id.*

[45] *State v. Bazer*, 276 Neb. 7, 751 N.W.2d 619 (2008).

[46] *State v. Vo*, 279 Neb. 964, 783 N.W.2d 416 (2010).

crime committed."[47] The U.S. Supreme Court has characterized this as a "'narrow proportionality principle'"[48] which "'does not require strict proportionality between crime and sentence,'"[49] but, rather, "'forbids only extreme sentences that are "grossly disproportionate" to the crime.'"[50] The Court has identified objective criteria which should guide an Eighth Amendment proportionality analysis, including "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."[51]

But "intrajurisdictional and interjurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality."[52] Courts must give "'substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes,'" bearing in mind that the Eighth Amendment "does not mandate adoption of any one penological theory" and "marked divergences both in underlying theories of sentencing and in the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure."[53] The "culpability of the offender" is also a factor in the analysis.[54] In its most recent application of these

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[47] *Solem, supra* note 39, 463 U.S. at 284.

[48] *Ewing v. California*, 538 U.S. 11, 20, 123 S. Ct. 1179, 155 L. Ed. 2d 108 (2003), quoting *Harmelin v. Michigan*, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991) (Kennedy, J., concurring in part and concurring in judgment). See, also, *Solem, supra* note 39.

[49] *Ewing, supra* note 48, 538 U.S. at 23, quoting *Harmelin, supra* note 48 (Kennedy, J., concurring in part and concurring in judgment).

[50] *Id.*

[51] *Solem, supra* note 39, 463 U.S. at 292.

[52] *Harmelin, supra* note 48, 501 U.S. at 1005 (Kennedy, J., concurring in part and concurring in judgment). See, also, *Ewing, supra* note 48.

[53] *Harmelin, supra* note 48, 501 U.S. at 999 (Kennedy, J., concurring in part and concurring in judgment).

[54] *Solem, supra* note 39, 463 U.S. at 292.

principles to a sentence of imprisonment, the U.S. Supreme Court in *Ewing v. California*[55] upheld a sentence of 25 years' to life imprisonment for grand theft under California's "three strikes law," concluding that it was not "'the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.'"[56]

The same conclusion is inescapable here. First degree murder is the most serious criminal offense defined by Nebraska law. "[I]n terms of moral depravity and of the injury to the person and to the public," other serious crimes do "not compare with murder."[57] Mantich received the minimum sentence which can be given to one convicted of first degree murder. Although he seeks to minimize his personal involvement in the events which led to the death of Thompson, we noted on direct appeal that "Mantich's statement to police was sufficient to establish that he was handed a gun, placed the gun against the back of Thompson's head, and pulled the trigger."[58] We further noted that the group robbed, terrorized, and forcibly restrained Thompson and that "Mantich encouraged these activities and participated in the verbal terrorization."[59]

Mantich cites several state court decisions from other jurisdictions in support of his Eighth Amendment argument. But those cases are either distinguishable on the facts or otherwise unpersuasive. Considering the gravity of the offense and all of the relevant facts and circumstances, notwithstanding Mantich's youth, there is no basis for a "threshold inference"[60] that his sentence was grossly disproportionate to his crime. Because Mantich's Eighth Amendment claim is

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[55] *Ewing*, *supra* note 48.

[56] *Id.*, 538 U.S. at 30, quoting *Harmelin*, *supra* note 48 (Kennedy, J., concurring in part and concurring in judgment).

[57] *Coker v. Georgia*, 433 U.S. 584, 598, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977). See, also, *Graham*, *supra* note 3.

[58] *Mantich*, *supra* note 35, 249 Neb. at 328, 543 N.W.2d at 194.

[59] *Id.* at 329, 543 N.W.2d at 194.

[60] See *Graham*, *supra* note 3, 560 U.S. at 93 (Roberts, J., concurring in judgment).

without merit under either alternative formulation, his counsel was not ineffective in not asserting it at sentencing or on direct appeal.

CONCLUSION

To summarize, in my view, the rule announced in *Miller* is procedural and does not apply to Mantich on collateral review. I would find that *Graham* has no application to Mantich's sentence of life imprisonment for first degree felony murder, a homicide, and that Mantich's alternative claim that his sentence was grossly disproportionate to his crime is procedurally barred. Because these claims are without merit, Mantich's trial and appellate counsel was not ineffective in failing to assert them. And because the files and records conclusively show that Mantich's motion for postconviction relief is without merit, the district court did not err in denying the requested relief without conducting an evidentiary hearing. I would affirm the decision of the district court.

HEAVICAN, C.J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V.
ERIC A. RAMIREZ, APPELLANT.
842 N.W.2d 694

Filed February 7, 2014. No. S-11-486.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
2. **Rules of Evidence: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
3. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
4. **Trial: Evidence: Appeal and Error.** An appellate court reviews the trial court's conclusions with regard to evidentiary foundation and witness qualification for an abuse of discretion.

5. **Motions for Mistrial: Appeal and Error.** Whether to grant a mistrial is within the trial court's discretion, and an appellate court will not disturb its ruling unless the court abused its discretion.
6. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
7. **Appeal and Error.** Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.
8. **Trial: Juries: Evidence.** Demonstrative exhibits are defined by the purpose for which they are offered at trial; demonstrative exhibits aid or assist the jury in understanding the evidence or issues in a case.
9. **Trial: Evidence.** Exhibits admitted only for demonstrative purposes do not constitute substantive evidence.
10. **Trial: Evidence: Appeal and Error.** On appeal, a defendant may not assert a different ground for his objection to the admission of evidence than was offered at trial.
11. **Appeal and Error.** An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground.
12. **Evidence: Words and Phrases.** Cumulative evidence means evidence tending to prove the same point of which other evidence has been offered.
13. **Trial: Evidence: Appeal and Error.** The erroneous admission of evidence is not reversible error if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding of the trier of fact.
14. **Criminal Law: Statutes: Sentences.** Where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise.
15. **Appeal and Error.** An appellate court always reserves the right to note plain error which was not complained of at trial or on appeal.
16. **Sentences: Weapons.** Although it is generally within the trial court's discretion to direct that sentences imposed for separate crimes be served concurrently or consecutively, Neb. Rev. Stat. § 28-1205(3) (Reissue 2008) does not permit such discretion in sentencing, because it mandates that a sentence for the use of a deadly weapon in the commission of a felony be served consecutively to any other sentence imposed and concurrent with no other sentence.
17. **Sentences: Appeal and Error.** An appellate court has the power on direct appeal to remand a cause for the imposition of a lawful sentence where an erroneous one has been pronounced.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Convictions affirmed, all sentences vacated, and cause remanded for resentencing.

James Martin Davis, of Davis Law Office, and Mark A. Weber, of Carlson & Burnett, L.L.P., for appellant.

Jon Bruning, Attorney General, James D. Smith, and Carrie A. Thober for appellee.

Heavican, C.J., Wright, Connolly, Stephan, McCormack, Miller-Lerman, and Cassel, JJ.

Miller-Lerman, J.

NATURE OF CASE

In this direct appeal, Eric A. Ramirez appeals from his convictions and sentences in the district court for Douglas County of two counts of first degree murder, three counts of use of a deadly weapon to commit a felony, one count of attempted second degree murder, one count of attempted robbery, and one count of criminal conspiracy. The first degree murder convictions are each Class IA felonies. Ramirez was 17 years old at the time of the murders. Ramirez assigns error to certain rulings regarding the admission and withdrawal of evidence. We find no merit to these assignments of error and affirm his convictions. Regarding the sentences imposed for his convictions, we conclude that the two life imprisonment sentences without the possibility of parole imposed for the two convictions of first degree murder, counts I and III, are unconstitutional and, accordingly, we vacate those sentences and remand the cause for resentencing consistent with Neb. Rev. Stat. § 28-105.02 (Supp. 2013). We find plain error in regard to the sentences imposed for the convictions of use of a deadly weapon to commit a felony, counts II, IV, and VII, and we vacate such sentences and remand the cause for resentencing consistent with Neb. Rev. Stat. § 28-1205(3) (Cum. Supp. 2012), such that each sentence imposed for the conviction of use of a deadly weapon runs consecutively to all other sentences and concurrently with no other sentence. We also find plain error in regard to the three sentences imposed for the convictions of count V, attempted second degree murder; count VI, attempted robbery; and count VIII, criminal conspiracy, because, as currently written, each of these three sentences was ordered to

run concurrently with the sentences for the convictions of use of a deadly weapon, and, even after resentencing in counts II, IV, and VII, these three sentences as written would impose sentences which would run concurrently with at least two sentences for the convictions of use of a deadly weapon. We vacate the sentences for counts V, VI, and VIII and remand the cause for resentencing such that the sentences imposed do not run concurrently with the sentences for the convictions of use of a deadly weapon. Accordingly, we affirm the convictions, vacate all of the sentences, and remand the cause for resentencing consistent with this opinion.

STATEMENT OF FACTS

This case involves three shootings that occurred on the night of November 12, 2008, at three separate locations in Omaha, Nebraska, within an hour of each other. These shootings resulted in the deaths of two people and injury to a third person. Ramirez, Edgar Cervantes, and Juan E. Castaneda were later arrested for the crimes; Cervantes testified against Ramirez and Castaneda pursuant to a plea agreement.

The first shooting took place at a residence located on Dorcas Street, in Omaha, where Luis Silva was shot at approximately 10:45 p.m. outside his residence. Jose Hernandez, Silva's cousin, was living with Silva at the time, along with an aunt and another cousin. Hernandez testified that he was home at approximately 10:30 p.m. when Silva's truck, a Chevrolet Blazer, arrived and parked in the driveway. Hernandez testified that he went outside to ask Silva to come inside and that Silva told Hernandez he was going to finish a telephone call. About 2 minutes later, Hernandez heard the truck's horn honk. Hernandez testified that he looked outside and saw Silva lying on the ground near the truck and a man with a gun standing next to him. Hernandez also saw another man by a tree nearby. The man next to Silva pointed his gun at Hernandez and, speaking in Spanish, said that "they only wanted money." The other man then said, "Let's go," in English. Through his porch window, Hernandez watched the two men leave. Hernandez testified that the man who pointed the gun at him was wearing black pants and a black, hooded sweatshirt and had a

goatee and that the other man was wearing black pants and a gray sweatshirt.

Silva was shot twice. One bullet grazed the left side of his head. The other bullet entered his upper back, and continued to the left side of his chest. Silva was pronounced dead upon his arrival at an Omaha hospital.

The second shooting took place near North 50th Street and Underwood Avenue. Shortly after Silva was shot, Charles Denton and Hilary Nelsen drove to a walkup automatic teller machine (ATM). Denton got out of the van he was driving to use the ATM, while Nelsen remained in the van. Nelsen and Denton saw two people walking toward their vehicle. Nelsen testified that they were male and were wearing their hoods up. Nelsen testified that after Denton started the van, the two men started running toward the van. One of the men approached the driver's-side window and yelled at Nelsen and Denton to give him money. The man fired his gun, and Denton drove away. Denton called the 911 emergency dispatch service, but after he realized that he had been shot, he asked Nelsen to talk to the 911 operator.

Nelsen testified that she believed the men were not white but that she could not tell if they were "Hispanic" or "black." Nelsen and Denton both testified that the gun was silver. Denton stated the men were Hispanic and that the man with the gun had facial hair. Denton testified that the shooter was wearing a lighter-colored, hooded sweatshirt; that the other man was wearing a darker-colored, hooded sweatshirt; and that both men were wearing their hoods up. Denton sustained a bullet wound through his left bicep and a graze on his chest.

The third shooting took place in the parking lot of a gas station at South 52d and Leavenworth Streets. Tari Glinsmann was finishing her shift at the gas station. A passerby noticed a green Ford Taurus in front of the gas station with the lights on, the door open, and the engine running. The passerby saw a body and called 911. Glinsmann was dead when the rescue workers arrived on the scene.

A crime scene technician with a specialty in fingerprint identification was called by the State to testify. The fingerprint specialist testified that she dusted the exterior of the Ford

Taurus, concentrating on areas where it appeared that the dust and dirt on the car had been smudged. She testified that she lifted three latent prints from the car: two on the hood of the car on the passenger side and one from just above the driver's-side door handle. She testified that the prints from the hood of the car appeared to be two parts of a left palmprint. After analysis, the fingerprint specialist determined that the latent prints found on the hood of the car matched Castaneda's prints.

Another of the State's witnesses was Cervantes, who agreed to testify against Ramirez and Castaneda pursuant to a plea agreement. Cervantes testified that on November 12, 2008, he called Ramirez to see "if he wanted to go jack [rob] some people and get some extra money." When Cervantes called Ramirez later, Ramirez said he was at a friend's house near South 24th and L Streets, and Cervantes offered to pick him up. Cervantes testified that he drank some beer and used cocaine while at the friend's house. Ramirez asked Cervantes if Castaneda could come along and if he could give "Tiny," another friend, a ride home. Cervantes agreed.

Cervantes testified that while he was on his way to drop off Tiny at home, Ramirez was in the front passenger seat and Tiny and Castaneda were in the back seat. Cervantes testified that he passed a gun, which was wrapped in a blue bandanna, to Ramirez and that Ramirez put the gun under his seat. Cervantes stated that after he dropped off Tiny, they proceeded to South 13th and Dorcas Streets where they saw "some white guys getting out of [a] truck." Cervantes testified that Ramirez and Castaneda got out of the car and tried to rob them. Ramirez and Castaneda then ran back to the car and said that the men did not have any money and that they "started getting crazy." Cervantes testified that both he and Ramirez were wearing gray, hooded sweatshirts and that Castaneda was wearing a black coat with fur trim and orange lining on the inside.

Cervantes testified that he then drove west on Dorcas Street, when Cervantes saw a man in a Chevrolet Blazer and pointed him out to Ramirez and Castaneda. Once again, Ramirez and Castaneda got out of the car while Cervantes waited. Cervantes heard a gunshot, Ramirez and Castaneda

ran back to the car, and Cervantes drove away. Cervantes testified that Ramirez told him that when the man started honking the horn, Ramirez shot him through the vehicle's window. Castaneda then pulled the man out of the vehicle and began searching him. The people inside the house tried to come out, but Ramirez pointed his gun at the house so they would not come outside. Ramirez and Castaneda then ran back to the car with the man's wallet.

Cervantes stated that after robbing Silva, he drove to the area around North 50th Street and Underwood Avenue, where they saw a man at an ATM. Once again, Ramirez and Castaneda got out of the car, and Cervantes drove around the block. Cervantes heard gunshots, and Ramirez and Castaneda ran back to the car. Cervantes testified that Ramirez told him that the man saw them coming and started to drive away in his van, so Ramirez shot at the van.

Cervantes then drove south until they reached South 52d and Leavenworth Streets. Ramirez and Castaneda then saw Glinsmann at the gas station and asked Cervantes to stop. Ramirez and Castaneda, once again, got out of the car and went over to the gas station. Cervantes parked in a nearby lot, and he heard a gunshot. Ramirez and Castaneda ran back to the car and got in. Cervantes testified that Ramirez said he shot Glinsmann in the head.

At trial, the State also called as a witness Preston Landell, the operations coordinator for Cricket Communications (Cricket) in Omaha and Lincoln, Nebraska, to testify regarding the cell phone records of Ramirez and Castaneda. Landell stated that he is essentially a recordkeeper for Cricket and that he had testified as a recordkeeper in other cases in the past. Landell testified that his duties included maintaining records at Cricket and being a resource for direct and indirect retail teams.

Landell stated that records of calls made were stored in a server for 6 months and that the date was recorded immediately at the time of sending a call. Text messages are stored in the same way, but on a different server. Records are kept for 6 months after the date of sending the text message. Landell testified as to the telephone number assigned to Ramirez and

the telephone number assigned to Castaneda's stepmother. The records show the cell phone number from which the call or text originated and the recipient's number, the time and duration of the call, and the cell tower used to process the call or text. The State offered the cell phone and text records for each of these accounts for the dates of November 9 to 19, 2008. The records were received without objection.

The State also showed Landell exhibit 224, which is a timeline summarizing the calls and texts between the cell phones of Ramirez, Castaneda, and a third telephone number from November 9 to 19, 2008. The information reflected on the timeline was extracted from cell phone account records already in evidence. Although exhibit 224 was discussed, it was not offered or received into evidence at this point in the trial.

Landell further testified regarding the operation of cell towers. He stated that as an operational employee, he had a "working knowledge of the infrastructure of the cell phone towers." Landell stated that when a call is made, the caller's cell phone searches for the closest available tower to route the call to a "switch." When the call reaches the switch, certain information is recorded in the server, including the date, time, and duration of the call; the caller's telephone number; the destination telephone number; the number of the cell tower that was used; and any special features that were used during the call. The switch then searches for the cell tower closest to the destination cell phone and uses that cell tower to route the call to the destination telephone. Landell testified that these records are kept and stored in the ordinary course of business, at or near the time the calls are made.

When the State asked Landell whether a cell phone would use the closest cell tower when sending or receiving a call, Ramirez objected on the basis of foundation. The objection was overruled, and Landell testified that that was generally how the system works, but not always. When asked whether there was a distance that a tower would pull a call from, Landell testified—over Ramirez' foundation objection—that a rural cell tower may have a 20-mile radius while the radius in an urban setting is much less because of obstructions and more tower traffic.

The State then offered exhibit 259, which is a map of a portion of Omaha showing the locations of the six cell towers that were used by Ramirez' cell phone the night of the shootings, along with the locations of the shootings. The map shown on exhibit 259 incorporated information from evidence that was previously admitted during trial with the exception of the exact street addresses of the cell towers. Landell stated that he had reviewed exhibit 259 and that the addresses and locations of the cell towers shown on the exhibit were correct. Ramirez objected to exhibit 259 based on foundation and was granted permission to voir dire Landell. During voir dire, Landell stated that generally, a cell phone call will go to the closest tower if it is available, but that he could not say with certainty that a call will always go to the closest tower. Landell further stated that if the towers are busy, a call may go to a number of towers before it is put through. The court overruled Ramirez' foundation objection and received exhibit 259 into evidence.

There is a suggestion in the record that the parties agreed to a stipulation of facts to the effect that Ramirez lived with his mother, that he was on probation, and that Ramirez' mother tried to ensure that he was home by curfew every night, but that she could not guarantee Ramirez never would have snuck out of the house after curfew. After the State rested, the defense did not call any witnesses or offer evidence.

Before closing arguments were made, the trial judge summoned counsel outside the presence of the jury to discuss exhibit 259, which was the map which showed the locations of the shootings and cell towers used by Ramirez' cell phone the night of the shootings. After further discussion, the judge withdrew exhibit 259, which had been admitted over Ramirez' foundational objection. The trial judge later orally admonished the jury by saying: "One final item on the evidence. Exhibit 259 has been withdrawn from evidence. You are instructed not to consider it in your deliberations or the testimony of . . . Landell regarding the location of cell towers insofar as the subscriber's location is concerned." Ramirez moved for a mistrial, which the court overruled. For completeness, we note that the

written jury instructions stated that the jury "must disregard all evidence ordered stricken."

The morning after jury deliberations began, it was noticed that exhibit 224, the timeline of the cell phone calls and texts which had been made between the cell phones of Ramirez, Castaneda, and a third subscriber, had not been offered or received into evidence. Exhibit 224 incorporated information from previously admitted evidence, primarily Ramirez' and Cervantes' cell phone records. After hearing arguments from both parties outside the presence of the jury, the court allowed the State to supplement the record and received exhibit 224 at that time. The district court judge commented that exhibit 224

> doesn't contain any information that hasn't been received into evidence, and it had been referenced [sic] to during the evidence and closing arguments. . . . It's a fair representation of a timeline that is already in evidence through those records. And so the exhibit will be included among the evidence that the court reporter transmits to the jury for [its] deliberation.

Ramirez moved for a mistrial, and the court overruled the motion.

The jury found Ramirez guilty on all eight counts. Ramirez filed a motion for new trial on various bases, including the admission and later withdrawal of exhibit 259, the map, and the admission of exhibit 224, the timeline of cell phone calls and texts. The district court denied Ramirez' motion for new trial.

In ruling on the motion for new trial, the court determined that the admission and later withdrawal of exhibit 259 did not require a new trial. The court explained: "I withdrew [exhibit] 259 from evidence, really, in an abundance of caution because I didn't want someone to draw the inference that the subscriber or user was in a particular location at a particular time and that that was the significance of [exhibit] 259." In further explaining why the court withdrew exhibit 259, the district court judge stated:

> It was a belt-and-suspenders approach, really. I don't think he [Landell] ever claimed in his testimony or the

> exhibit ever stated that the subscriber or the user was in a particular location at a given time. He just talked about the program; the way, depending upon traffic, cell towers are programmed to receive and transmit incoming and outgoing calls.

In denying Ramirez' motion for new trial, the district court also stated that the admission of exhibit 224, the timeline of cell phone calls and texts, did not require a new trial. The court stated that exhibit

> 224 was not itself an item of evidence but a summary of other evidence that had been received and it was referred to during the trial for the jury's benefit by counsel at different times, and I did not want to hobble the jury in [its] consideration of the evidence by taking an item away from [its] consideration that everybody had used, and [exhibit 224] was itself not substantive evidence but a compilation of other items that had been separately received.

Following denial of the motion for new trial, the court conducted the sentencing hearing on December 29, 2010. The December 30, written sentencing order stated that Ramirez had been informed of his convictions for the following eight crimes:

Count I	Murder in the First Degree . . . .
Count II	Use of a Deadly Weapon to Commit a Felony . . . .
Count III	Murder in the First Degree . . . .
Count IV	Use of a Deadly Weapon to Commit a Felony . . . .
Count V	Attempted Murder in the Second Degree . . . .
Count VI	Attempted Robbery . . . .
Count VII	Use of a Deadly Weapon to Commit a Felony . . . .
Count III	Criminal Conspiracy . . . .

We note that counts I and III, murder in the first degree, are Class IA felonies. See Neb. Rev. Stat. § 28-303 (Reissue 2008). We further note that counts II, IV, and VII involve use of a deadly weapon to commit a felony.

The sentencing order set forth Ramirez' sentences as follows:

Count I	Life imprisonment without the possibility of parole
Count II	12 - 15 years consecutive to Count I only
Count III	Life imprisonment without the possibility of parole
Count IV	12 - 15 years consecutive to Count III only
Count V	12 - 20 years concurrent with all
Count VI	12 - 15 years concurrent with all but Count VII
Count VII	12 - 15 years consecutive to Count VI only
Count VIII	12 - 15 years concurrent with all

In its sentencing order, the district court ordered that each of the sentences for the convictions of use of a deadly weapon were to run consecutively only to the sentence for the underlying felony conviction.

On April 13, 2011, we dismissed Ramirez' first appeal in case No. S-11-090, based on Ramirez' failure to submit a docket fee or file a poverty affidavit. Ramirez then filed a motion to vacate judgment of conviction in the district court for Douglas County, which the district court granted, limiting relief to a new direct appeal of the original convictions and sentences. This is the direct appeal before us.

While this appeal was pending, the U.S. Supreme Court decided *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455, 2469, 183 L. Ed. 2d 407 (2012), holding that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." Ramirez was born in September 1991, which made him 17 years old at the time of the crimes. On July 11, 2012, we filed an order directing supplemental briefing, instructing the parties to address issues raised by *Miller v. Alabama*, *supra*.

After this court heard oral argument, the Nebraska Legislature passed, and the Governor signed, 2013 Neb. Laws, L.B. 44, which amended state law to "change penalty provisions with respect to Class IA felonies committed by persons under eighteen years of age [and] to change parole procedures with respect to offenses committed by persons under eighteen years of age." On September 12, 2013, we filed an

order directing supplemental briefing, instructing the parties to address whether the provisions of L.B. 44 apply to Ramirez if the cause is remanded for resentencing.

ASSIGNMENTS OF ERROR

Ramirez claims, summarized and restated, that the district court erred when it (1) denied his motion for new trial based on the denial of his motion for mistrial resulting from the admission and later withdrawal of exhibit 259, the map, and testimony relative thereto, and (2) denied his motion for new trial based on the denial of his motion for mistrial resulting from the admission of exhibit 224, the timeline of cell phone calls and texts, after the parties had rested.

In his first supplemental brief, Ramirez assigns additional errors, rephrased, that (3) the two life sentences imposed on him violated the Eighth Amendment's ban on cruel and unusual punishment by imposing lifetime sentences without first requiring a sentencing hearing and without any meaningful opportunity for the juvenile to obtain release based on demonstrated maturity and rehabilitation, and (4) the district court erred by sentencing Ramirez to two terms of life imprisonment without the possibility of parole, because the sentences are not authorized under existing Nebraska statutes and the sentences are void as unconstitutional under *Miller v. Alabama*, *supra*.

STANDARDS OF REVIEW

[1-3] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *State v. Merchant*, 285 Neb. 456, 827 N.W.2d 473 (2013). Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion. *Id*. An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id*.

[4] An appellate court reviews the trial court's conclusions with regard to evidentiary foundation and witness qualification for an abuse of discretion. *State v. Richardson*, 285 Neb. 847, 830 N.W.2d 183 (2013).

[5] Whether to grant a mistrial is within the trial court's discretion, and we will not disturb its ruling unless the court abused its discretion. *State v. Watson*, 285 Neb. 497, 827 N.W.2d 507 (2013).

[6] In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Williams*, 282 Neb. 182, 802 N.W.2d 421 (2012).

[7] Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process. *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013).

ANALYSIS

Exhibit 259 and Related Testimony.

Ramirez contends that it was error to admit certain of Landell's testimony and exhibit 259, a map of a portion of Omaha showing the location of the shootings, the residences of various persons, and the locations of cell towers that were used by Ramirez' cell phone on the night of the shootings. Ramirez contends there was insufficient foundation for the evidence. Ramirez further asserts that the district court's later withdrawal of the exhibit, its striking of the testimony, and its admonition to the jury were insufficient to cure this error. Ramirez thus claims that the district court erred when it overruled his motion for mistrial and denied his motion for new trial on the same basis.

In a criminal case, we review the denial of a motion for new trial for abuse of discretion. See *State v. Williams*, *supra*. As explained below, exhibit 259 was merely demonstrative, and Landell provided sufficient foundation for the information on exhibit 259. We therefore determine that neither the

proceedings surrounding exhibit 259 nor the denial of the motion for mistrial based on the rulings surrounding exhibit 259 was an abuse of discretion and that therefore, a new trial was not warranted. We find no merit to Ramirez' argument.

[8] With respect to the nature of exhibit 259, we first note that exhibit 259 was admissible at trial as a demonstrative exhibit. Demonstrative exhibits are defined by the purpose for which they are offered at trial; demonstrative exhibits aid or assist the jury in understanding the evidence or issues in a case. *State v. Pangborn*, 286 Neb. 363, 836 N.W.2d 790 (2013). See, also, 2 McCormick on Evidence § 214 (Kenneth S. Broun et al. eds., 7th ed. 2013). Demonstrative exhibits "are relevant . . . only because of the assistance they give to the trier in understanding other real, testimonial and documentary evidence." *Id*. at 19.

Exhibit 259 reflected numerous undisputed facts already in evidence, including the location of the shootings, the residences of various persons, and the location of the cell towers used during the timeframe of the shootings. Ramirez does not take issue with the depiction of this evidence on the map. Overall, exhibit 259 was demonstrative.

Ramirez concedes that his cell phone records and Landell's related testimony explaining how to interpret the information shown in the cell phone records were properly admitted into evidence. These records indicated which cell towers were used by Ramirez' cell phone on the night of the shootings. The information on the map shown on exhibit 259 was derived from properly admitted evidence; with the exception of the exact street addresses for cell towers, exhibit 259 was a demonstrative exhibit that was used to aid the jury in understanding the facts already in evidence. Because exhibit 259 was demonstrative, it was not error for the district court to admit it or to publish it to the jury during trial.

[9] Although withdrawal was not necessary, we do not find an abuse of discretion to the district court's subsequent withdrawal of exhibit 259. We have stated that due to the difference in purpose, an exhibit admitted for demonstrative purposes—that is, to aid the jury—is not evidence in the same way that an exhibit admitted for substantive purposes—that

is, as proof of an underlying fact or occurrence—is evidence. *State v. Pangborn*, *supra*. In *Pangborn*, we agreed with the majority of appellate courts and the major evidence treatises and held that exhibits admitted only for demonstrative purposes do not constitute substantive evidence. *Id.* (citing cases). Exhibit 259 aided the jury while it was available during trial. For the district court to withdraw exhibit 259, which was not substantive, was not an abuse of discretion. The jury was not disadvantaged, nor was Ramirez harmed when exhibit 259, which was nonsubstantive evidence, was not ultimately admitted.

[10,11] With respect to the foundation for exhibit 259, we note that when the State offered exhibit 259 at trial, Ramirez objected to the exhibit only on the basis of foundation. On appeal, a defendant may not assert a different ground for his objection to the admission of evidence than was offered at trial. *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012). An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground. *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006), *abrogated on other grounds*, *State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010). Accordingly, our analysis is limited to Ramirez' claim that the district court initially erroneously admitted exhibit 259 and Landell's related testimony based on insufficient foundation.

Under Neb. Evid. R. 602, Neb. Rev. Stat. § 27-602 (Reissue 2008), a lay witness will not be permitted to testify as to objective facts in the absence of foundational evidence establishing personal knowledge of such facts. See *State v. Kirksey*, 254 Neb. 162, 575 N.W.2d 377 (1998). Evidence rule 602, regarding laying the foundation of personal knowledge, provides:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of section 27-703, relating to opinion testimony by expert witnesses.

Pertinent to our analysis in the present case is our decision in *State v. Robinson*, *supra*. In *Robinson*, prior to trial, the defendant made a motion in limine with respect to the defendant's cell phone records. The defendant complained that the State had gathered data regarding the locations of the towers through which the defendant had placed telephone calls, and he contended that the location data were not scientifically reliable. The trial court overruled the motion in limine, pending the State's presentation at trial of proper and sufficient foundation for the evidence.

At trial in *Robinson*, two witnesses who worked for the communications company, Cricket, testified. One was a "'switch tech,'" who worked on the central computer system that interacted with the cellular sites, and the other was a field engineer, who was responsible for maintaining and optimizing the network of cellular sites throughout the city of Omaha. *Id*. at 611, 724 N.W.2d at 63. During the switch tech's testimony, the State offered the cell phone records. The defendant objected to the records on the bases of foundation, hearsay, and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). The objections were overruled, and the exhibits were received.

We concluded in *Robinson* that the cell phone records offered by the State fell within the business records exception to the rule against hearsay. We then determined that a *Daubert* challenge was not pertinent to the cell phone records, because they "contained nothing even resembling 'expert opinion testimony.'" *State v. Robinson*, 272 Neb. at 619, 724 N.W.2d at 69. We further determined that *Daubert* remained inapplicable even if the defendant's objections and argument were construed to address the field engineer's testimony relating to the cell phone records, because the field engineer's testimony was limited to explaining the data contained in the cell phone records, and he did not offer any opinions based on that data. We stated that "[t]o the extent that the defendant wanted to raise more general questions about the reliability of the records and the cellular location data, [the field engineer] was available for cross-examination on those issues." *State v. Robinson*, 272 Neb. at 620, 724 N.W.2d at 69. Based on our determinations

that the cell phone records fell within the business records exception and that given the purpose for which the records were offered no *Daubert* hearing was required with respect to the records, we determined that the trial court did not err when it admitted the cell phone records into evidence.

After deciding *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006), we decided *State v. Taylor*, 282 Neb. 297, 803 N.W.2d 746 (2011), which also involved the admission of cell phone records into evidence. In *Taylor*, the defendant claimed that cell phone records were erroneously admitted into evidence due to a lack of foundation. The defendant based his foundational argument on the requirement of authentication provided by Neb. Evid. R. 901, Neb. Rev. Stat. § 27-901 (Reissue 2008). In *Taylor*, the cell phone records at issue were authenticated by the same Cricket employee, Landell, who testified in the present case. We rejected the defendant's argument and determined that Landell's testimony was sufficient to authenticate the cell phone records.

In the present case, the cell phone records indicated which cell towers were used by Ramirez' cell phone on the night of the shootings, and Ramirez concedes that the cell phone records and Landell's related testimony explaining how to interpret the information shown in the records were properly admitted into evidence. At trial, Ramirez objected to exhibit 259 only on the basis of foundation. He does not argue that exhibit 259 or Landell's related testimony was inadmissible as expert testimony under Neb. Evid. R. 703, Neb. Rev. Stat. § 27-703 (Reissue 2008), or that the evidence was subject to a *Daubert* hearing. Instead, Ramirez contends that there was an insufficient basis that Landell had personal knowledge regarding the routing of cell phone calls among cell towers and the locations of subscribers in relation to those towers. We believe that Ramirez misconstrues the record and the nature of Landell's testimony. We therefore disagree with Ramirez' argument that there was insufficient foundation for exhibit 259 and Landell's related testimony.

At trial, Landell testified that as an operational employee, he was required "to have a working knowledge of the infrastructure of the cell phone towers." He also testified that he

had many discussions with the network operation technicians or engineers at Cricket regarding cell tower locations and how the infrastructure is used. Landell also testified how, as a general matter, cell phone calls are routed through the network.

Landell testified that when a call is made, generally, the caller's cell phone searches for the closest available tower to route the call to the switch. The switch then typically searches for the closest available tower to the destination cell phone, and it uses that tower to route the call to the destination cell phone. Landell testified that the closest tower to the caller's cell phone or the destination cell phone will not always be used because of too much traffic or some other obstruction. With respect to exhibit 259, Landell testified that he had reviewed the exhibit and that the addresses and the locations of the cell towers shown on the map were accurate.

Based on Landell's testimony, we determine that he provided sufficient foundational evidence to demonstrate that he had personal knowledge generally regarding how cell phone calls are routed through the network, which cell towers were used by Ramirez' cell phone on the night of the shootings, and that the location on the map of the cell towers used that night were accurate. Furthermore, Ramirez cross-examined Landell regarding the foregoing issues, and he was permitted to question Landell when the State offered exhibit 259. As an operational employee of Cricket, Landell was able to verify the addresses and locations of the cell towers depicted on the exhibit 259 map. It is significant, and we note, that Landell did not offer an opinion regarding cell tower locations and their relation to Ramirez' location. Based upon his testimony at trial, we determine that there was sufficient foundational evidence to demonstrate Landell's personal knowledge under rule 602, and thus the admission of exhibit 259 was not objectionable on this basis.

We are aware that there is currently a discussion among the courts regarding the reliability and the admissibility of cell tower location data and their relation to a defendant's location. See, e.g., *U.S. v. Evans*, 892 F. Supp. 2d 949 (N.D. Ill. 2012). See, also, Aaron Blank, *The Limitations and Admissibility of*

Using Historical Cellular Site Data to Track the Location of a Cellular Phone, 18 Rich. J.L. & Tech. 3 (2011). We are also aware that there are emerging legislation and discussions regarding the necessity of a search warrant to obtain tracking information from cell phone providers. See, e.g., Mont. Code Ann. § 46-5-110 (2013); *State v. Earls*, 214 N.J. 564, 70 A.3d 630 (2013). However, at the trial of the present case, Ramirez did not claim that exhibit 259 was inadmissible on these bases. Ramirez objected only on the basis of foundation, and, as stated above, we have determined that sufficient foundation was laid for the admission of exhibit 259 and Landell's related testimony.

Based on our determination that sufficient foundation was laid and based on the fact that exhibit 259 was a demonstrative exhibit, we determine that the district court did not abuse its discretion when it admitted exhibit 259 and Landell's related testimony into evidence. Although it was not necessary, the district court did not err when it later withdrew exhibit 259 and admonished the jury regarding exhibit 259. The district court did not abuse its discretion when it denied Ramirez' motion for mistrial based on exhibit 259, and thus it did not err when it later denied his motion for new trial on the same basis.

Exhibit 224.

Ramirez contends that it was error to admit exhibit 224, a timeline summarizing the calls and texts between the cell phones used by Ramirez, Castaneda, and a third telephone number. As recited in our "Statement of Facts," exhibit 224 was received after the close of evidence. Ramirez contends that the district court erred when it denied his motion for mistrial based on admission of exhibit 224 and thus it erred when it denied his motion for new trial urged on the same basis. Because we determine that the district court did not abuse its discretion when it admitted exhibit 224, we determine that the court did not err when it denied Ramirez' motion for mistrial on the basis of admitting exhibit 224 and did not err when it denied his motion for new trial on this basis. Thus, we find no merit to this assignment of error.

Ramirez concedes that exhibit 224 was referred to during trial and that its contents were derived from documents admitted in evidence. He nevertheless contends that it was not properly offered or received. He states that after the jury began its deliberations, the State could have reopened its case to offer exhibit 224. Ramirez contends that because exhibit 224 was not offered during the evidentiary portion of the trial and because there was no motion to reopen the evidence, the district court did not adhere to the proper formalities for receipt of evidence and that a mistrial should have been declared.

In the present case, after closing arguments were given and after jury instructions were read, the case was given to the jury on October 20, 2010, at 4:18 p.m. for deliberations. The next day at approximately 9 a.m., during what might fairly be characterized as "housekeeping," the district court judge noticed that exhibit 224 had not been received into evidence and brought this to the attention of counsel. After arguments by both parties, the judge stated outside the hearing of the jury that exhibit 224

> doesn't contain any information that hasn't been received into evidence, and it had been referenced [sic] to during the evidence and closing arguments. I think that it would hobble the jury to take that away from [it]. It's a fair representation of a timeline that is already in evidence through those records.

Based upon this reasoning, the court stated that exhibit 224 would "be included among the evidence that the court reporter transmits to the jury for [its] deliberation." Ramirez moved for a mistrial, which was overruled. He later unsuccessfully moved for a new trial on this same basis.

[12,13] Exhibit 224 was a demonstrative exhibit. As we have recently explained, demonstrative exhibits are exhibits offered at trial to aid or assist the jury in understanding the evidence or issues in a case. See *State v. Pangborn*, 286 Neb. 363, 836 N.W.2d 790 (2013). See, also, 2 McCormick on Evidence § 214 (Kenneth S. Broun et al. eds., 7th ed. 2013). The information contained in exhibit 224 was a synthesis of information taken from other lengthy exhibits that were properly received into evidence during trial without

objection. Furthermore, because exhibit 224 contained facts already received in evidence, it was cumulative. Cumulative evidence means evidence tending to prove the same point of which other evidence has been offered. *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996). The erroneous admission of evidence is not reversible error if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding of the trier of fact. See *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006). In fact, at the hearing on Ramirez' motion for new trial, Ramirez' attorney stated that exhibit 224 "was merely a summary of telephone records that were already in evidence that, I would concede, would have been considered cumulative in nature."

Based on the fact that exhibit 224 was a demonstrative exhibit and that it was cumulative of other properly admitted evidence, we cannot say that the district court abused its discretion when it admitted exhibit 224 into evidence. We acknowledge that the formality of reopening the record was not observed, but as we read the record quoted above, exhibit 224 was added to the evidence at a time previous to when the court reporter might later transmit evidence to the jury. We cannot find that the procedure employed was prejudicial. Accordingly, we determine that the district court did not err when it denied Ramirez' motion for mistrial and, thus, it did not err when it denied his motion for new trial with respect to the admission of exhibit 224.

Ramirez' Sentences.

Ramirez claims that the district court erred when it sentenced him to life imprisonment without the possibility of parole for counts I and III. After Ramirez filed his notice of appeal but before the case was argued before us, the U.S. Supreme Court decided *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). *Miller* generally held that it is unconstitutional to sentence a juvenile convicted of a homicide to a mandatory sentence of life imprisonment without the possibility of parole.

This court filed an order directing supplemental briefing, instructing the parties to address the issues raised by *Miller*. In

its supplemental brief, the State argued that Ramirez' sentences were unaffected by *Miller* because they were not sentences without the possibility of parole. The State suggested that the district court improperly sentenced Ramirez to "[l]ife imprisonment without the possibility of parole" and that instead, under Nebraska law, the court should have simply sentenced Ramirez to "'life imprisonment.'" Supplemental brief for appellee at 2. With the deletion of the phrase "without the possibility of parole," the State contends that Ramirez' sentences were not sentences without the possibility of parole, because upon commutation to a term of years, parole would be available to Ramirez. The State further argued that if *Miller* did apply, Ramirez' current life sentences should be vacated and the cause remanded for resentencing in light of the sentencing factors which are discussed in *Miller* and which are now reflected in § 28-105.02.

Similar to the State, Ramirez argued in his supplemental briefing that the district court improperly added the phrase "without the possibility of parole" to his sentences of life imprisonment. Supplemental brief for appellant at 21. Of greater relevance, however, Ramirez argued that *Miller* is applicable to this case and that in light of *Miller*, Ramirez' life sentences were unconstitutional and his sentences should therefore be vacated and he should be resentenced in accordance with § 28-105.02.

We recently addressed similar arguments regarding *Miller* and its application in *State v. Castaneda*, *ante* p. 289, 842 N.W.2d 740 (2014), which, like the current case, was before us on direct appeal. In *Castaneda*, the defendant, a juvenile at the time of his crimes, was convicted of two first degree murders and was sentenced to two terms of life imprisonment without the possibility of parole. In *Castaneda*, we noted that at the time the defendant was sentenced, Nebraska's statutes provided that a juvenile convicted of first degree murder was subject to mandatory life imprisonment, and although the statutes did not expressly contain the qualifier "without parole," we found that "Nebraska's sentence of life imprisonment is effectively life imprisonment without parole under the rationale of

Miller . . . because it provides no meaningful opportunity to obtain release." *Ante* at 313-14, 842 N.W.2d at 758. We further determined that because *Castaneda* was before us on direct appeal, *Miller* was applicable. The instant case is also before us on direct appeal, and we determine, as we did in *Castaneda*, that *Miller* is applicable.

After we heard oral argument on Ramirez' appeal, in reaction to *Miller*, the Nebraska Legislature passed, and the Governor signed, L.B. 44, which amended state law to "change penalty provisions with respect to Class IA felonies committed by persons under eighteen years of age [and] to change parole procedures with respect to offenses committed by persons under eighteen years of age."

Section 28-105.02 provides:

> (1) Notwithstanding any other provision of law, the penalty for any person convicted of a Class IA felony for an offense committed when such person was under the age of eighteen years shall be a maximum sentence of not greater than life imprisonment and a minimum sentence of not less than forty years' imprisonment.
>
> (2) In determining the sentence of a convicted person under subsection (1) of this section, the court shall consider mitigating factors which led to the commission of the offense. The convicted person may submit mitigating factors to the court, including, but not limited to:
>
> (a) The convicted person's age at the time of the offense;
>
> (b) The impetuosity of the convicted person;
>
> (c) The convicted person's family and community environment;
>
> (d) The convicted person's ability to appreciate the risks and consequences of the conduct;
>
> (e) The convicted person's intellectual capacity; and
>
> (f) The outcome of a comprehensive mental health evaluation of the convicted person conducted by an adolescent mental health professional licensed in this state. The evaluation shall include, but not be limited to, interviews with the convicted person's family in order

> to learn about the convicted person's prenatal history, developmental history, medical history, substance abuse treatment history, if any, social history, and psychological history.

And Neb. Rev. Stat. § 83-1,110.04 (Supp. 2013) further provides:

> (1) Any offender who was under the age of eighteen years when he or she committed the offense for which he or she was convicted and incarcerated shall, if the offender is denied parole, be considered for release on parole by the Board of Parole every year after the denial.
>
> (2) During each hearing before the Board of Parole for the offender, the board shall consider and review, at a minimum:
>
> (a) The offender's educational and court documents;
>
> (b) The offender's participation in available rehabilitative and educational programs while incarcerated;
>
> (c) The offender's age at the time of the offense;
>
> (d) The offender's level of maturity;
>
> (e) The offender's ability to appreciate the risks and consequences of his or her conduct;
>
> (f) The offender's intellectual capacity;
>
> (g) The offender's level of participation in the offense;
>
> (h) The offender's efforts toward rehabilitation; and
>
> (i) Any other mitigating factor or circumstance submitted by the offender.

At the time of Ramirez' sentencing for first degree murder, the district court was required to impose a sentence of life imprisonment. See Neb. Rev. Stat. § 28-105(1) (Reissue 2008). As we explained above, a sentence imposed under § 28-105(1) was tantamount to life imprisonment without the possibility of parole and, under *Miller*, such sentence was unconstitutional. Ramirez' life sentences for counts I and III imposed under § 28-105(1) as it then existed must be vacated, and Ramirez must be resentenced.

In view of the enactment of L.B. 44, this court sought supplemental briefing regarding the issue of whether Ramirez should be resentenced under the provisions of L.B. 44. Both

the State and Ramirez contend that L.B. 44 should be utilized if this cause is remanded for resentencing.

[14] This court recently discussed the applicability on direct appeal of L.B. 44 in *State v. Castaneda*, *ante* p. 289, 842 N.W.2d 740 (2014). We stated in *Castaneda* that

> the change effected by L.B. 44 does not violate ex post facto principles.
>
> Nor is it inconsistent under Nebraska law for this mitigation in sentencing to apply upon resentencing. "[W]here a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise." And in this case, the Legislature has not provided otherwise.

Ante at 319, 842 N.W.2d at 762. In light of the foregoing discussion, we determine that L.B. 44 applies to Ramirez' resentencing upon remand. We therefore vacate Ramirez' life sentences imposed for counts I and III and remand the cause for resentencing under the procedures set forth under L.B. 44.

[15] In addition to the corrections needed regarding the sentences for murder, we also note that upon our review of the record, we find plain error in the district court's sentencing order regarding the sentences for use of a deadly weapon to commit a felony, counts II, IV, and VII, and regarding the sentences for attempted second degree murder, count V; attempted robbery, count VI; and criminal conspiracy, count VIII. An appellate court always reserves the right to note plain error which was not complained of at trial or on appeal. *State v. Scott*, 284 Neb. 703, 824 N.W.2d 668 (2012). Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process. *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013). As explained below, each sentence for use of a deadly weapon, counts II, IV, and VII, should have been

ordered to run consecutively to all other sentences imposed and not concurrently with any sentence, and the sentences for attempted second degree murder, attempted robbery, and criminal conspiracy, counts V, VI, and VIII, respectively, should not have been ordered to be served concurrently with any use of a deadly weapon sentence.

In its December 30, 2010, order, the district court stated that Ramirez had been informed of his convictions for the following crimes:

Count I	Murder in the First Degree . . . .
Count II	Use of a Deadly Weapon to Commit a Felony . . . .
Count III	Murder in the First Degree . . . .
Count IV	Use of a Deadly Weapon to Commit a Felony . . . .
Count V	Attempted Murder in the Second Degree . . . .
Count VI	Attempted Robbery . . . .
Count VII	Use of a Deadly Weapon to Commit a Felony . . . .
Count III	Criminal Conspiracy . . . .

Counts II, IV, and VII involve use of a deadly weapon to commit a felony.

The written order then set forth Ramirez' sentences as follows:

Count I	Life imprisonment without the possibility of parole
Count II	12 - 15 years consecutive to Count I only
Count III	Life imprisonment without the possibility of parole
Count IV	12 - 15 years consecutive to Count III only
Count V	12 - 20 years concurrent with all
Count VI	12 - 15 years concurrent with all but Count VII
Count VII	12 - 15 years consecutive to Count VI only
Count VIII	12 - 15 years concurrent with all

At the sentencing hearing, the district court judge pronounced Ramirez' sentences by stating:

It'll be the sentence and judgment of the Court on Count 1 that [Ramirez] be incarcerated through the Department of Correctional Services for murder in the first degree to a term of life imprisonment.

Under Count 2, the use of a deadly weapon to commit that felony, it will be the sentence and judgment of the Court that he be incarcerated for a period of 12 to 15 years. *The statute . . . requires the sentence to be served consecutive to the underlying conviction.*

Count 3, murder in the first degree, it will be the sentence and judgment of the Court that [Ramirez] be imprisoned for life.

Under Count 4, [the use of a deadly weapon to commit the felony of murder in the first degree,] it will be the sentence and judgment of the Court that [Ramirez] be incarcerated for an indeterminate period of 12 to 15 years, and *the statute requires that that sentence be served consecutive to the underlying conviction.*

On Count 5, attempted murder in the second degree, it will be the sentence and judgment of the Court that [Ramirez] be incarcerated for an indeterminate period of 12 to 20 years in prison.

Under Count 6, the attempted robbery, it will be the sentence and judgment of the Court that [Ramirez] be incarcerated for a period of 12 to 15 years.

Under Count 7, use of a deadly weapon to commit the felony in Count 6, it'll be the sentence and judgment of the Court that [Ramirez] be incarcerated for an indeterminate period of 12 to 15 years *consecutive to Count 6 only.*

Under Count 8, the criminal conspiracy, it will be the sentence and judgment of the Court that [Ramirez] be incarcerated through the Department of Correctional Services for an indeterminate period of 12 to 15 years.

Now, *the sentences in Counts 1 and 2 are, for record purposes, imposed concurrent with the sentences in Counts 3 and 4 and with Counts 5 and 6. Count 5 is a sentence that's concurrent with other convictions.*

> *Count 6, the attempted robbery, is concurrent with the — all but Count 7*. And Count 8, the criminal conspiracy, the sentence there is *concurrent with all of the others*.

(Emphasis supplied.)

[16] With respect to the three sentences for the convictions of use of a deadly weapon, the record shows that the district court has a misperception of the law. Section 28-1205(3) concerns the crimes of use of a deadly weapon and provides: "The crimes defined in this section shall be treated as separate and distinct offenses from the felony being committed, and sentences imposed under this section shall be consecutive to any other sentence imposed." Although it is generally within the trial court's discretion to direct that sentences imposed for separate crimes be served concurrently or consecutively, we have long held that § 28-1205(3) does not permit such discretion in sentencing, because it mandates that a sentence for the use of a deadly weapon in the commission of a felony be served consecutively to any other sentence imposed and concurrent with no other sentence. See *State v. Sorenson*, 247 Neb. 567, 529 N.W.2d 42 (1995). See, also, *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Wilson*, 16 Neb. App. 878, 754 N.W.2d 780 (2008).

Because § 28-1205(3) mandates that the sentence imposed for a conviction of use of a deadly weapon be consecutive to any other sentence and concurrent with no other sentence, the district court did not have the authority to order that the sentences for the convictions of use of a deadly weapon to commit a felony, counts II, IV, and VII, run consecutively only to the sentences for the underlying felony offenses. Furthermore, the district court erred when it imposed the following sentences to run concurrently with the sentences for the convictions involving use of a deadly weapon: count V, attempted second degree murder, 12 to 20 years' imprisonment "concurrent with all"; count VI, attempted robbery, 12 to 15 years' imprisonment "concurrent with all but Count VII"; and count VIII, criminal conspiracy, 12 to 15 years' imprisonment "concurrent with all." The district court did not have the authority to order that the sentences for counts V, VI, and

VIII run concurrently with any sentences for use of a deadly weapon, and the sentences imposed for counts V, VI, and VIII constitute plain error.

[17] An appellate court has the power on direct appeal to remand a cause for the imposition of a lawful sentence where an erroneous one has been pronounced. *State v. Gunther*, 271 Neb. 874, 716 N.W.2d 691 (2006); *State v. Wilson, supra*. Therefore, we vacate the sentences imposed in counts II, IV, and VII for the convictions of use of a deadly weapon, and vacate the sentences imposed for count V, attempted second degree murder; count VI, attempted robbery; and count VIII, criminal conspiracy, and remand the cause with directions that the district court resentence Ramirez such that each sentence for the conviction of use of a deadly weapon runs consecutively to any other sentences imposed and not concurrently with any other sentence and that the sentences for counts V, VI, and VIII not be ordered served concurrently with any sentence for use of a deadly weapon.

CONCLUSION

We determine that the district court did not abuse its discretion when it received exhibit 259 and Landell's related testimony into evidence. The district court's subsequent ruling to withdraw exhibit 259 was not an abuse of discretion. Accordingly, the district court did not err when it denied Ramirez' motion for mistrial based on rulings surrounding exhibit 259 and, therefore, it did not err when it denied his motion for new trial on this basis. We further determine that the district court did not abuse its discretion when it received exhibit 224. Thus, it did not err when it denied Ramirez' motion for mistrial based on the admission of exhibit 224 and, therefore, did not err when it denied his motion for new trial on this basis. Ramirez' convictions are affirmed.

We conclude that the life sentences mandatorily imposed upon Ramirez for counts I and III were effectively life imprisonment sentences without the possibility of parole and unconstitutional under *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). Accordingly, we vacate those unconstitutional sentences and remand the cause

for resentencing in accordance with L.B. 44, as codified at § 28-105.02.

Upon our review of the record, we find plain error in the district court's sentencing order, which ordered that the three sentences for the convictions of use of a deadly weapon to commit a felony, counts II, IV, and VII, run concurrently with any other sentence. We also find plain error in the district court's sentencing order, which ordered that the sentences for the convictions of count V, attempted second degree murder; count VI, attempted robbery; and count VIII, criminal conspiracy, run concurrently with the sentences for use of a deadly weapon. We therefore vacate the sentences for counts II, IV, V, VI, VII, and VIII, and remand the cause to the district court with directions to resentence Ramirez on all these counts, so that each sentence for the conviction of use of a deadly weapon runs consecutively to all other sentences and concurrently with no sentence.

CONVICTIONS AFFIRMED, ALL SENTENCES VACATED, AND CAUSE REMANDED FOR RESENTENCING.

STATE OF NEBRASKA, APPELLEE, V.
TREVELLE J. TAYLOR, APPELLANT.
842 N.W.2d 771

Filed February 14, 2014. No. S-12-434.

1. **Rules of Evidence: Hearsay: Appeal and Error.** Apart from rulings under the residual hearsay exception, an appellate court will review for clear error the factual findings underpinning a trial court's hearsay ruling and review de novo the court's ultimate determination whether the court admitted evidence over a hearsay objection or excluded evidence on hearsay grounds.
2. **Identification Procedures: Due Process: Appeal and Error.** A district court's conclusion whether an identification is consistent with due process is reviewed de novo, but the court's findings of historical fact are reviewed for clear error.
3. **Constitutional Law: Statutes: Judgments: Appeal and Error.** The constitutionality and construction of a statute are questions of law, regarding which the Nebraska Supreme Court is obligated to reach conclusions independent of those reached by the court below.
4. **Trial: Verdicts: Appeal and Error.** Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether

in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.

5. **Trial: Evidence: Appeal and Error.** Erroneous admission of evidence is harmless error and does not require reversal if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact.
6. **Criminal Law: Identification Procedures: Witnesses: Words and Phrases.** A showup is usually defined as a one-on-one confrontation where the witness views only the suspect, and it is commonly conducted at the scene of the crime, shortly after the arrest or detention of a suspect and while the incident is still fresh in the witness' mind.
7. **Constitutional Law: Identification Procedures: Due Process.** An identification procedure is constitutionally invalid only when it is so unnecessarily suggestive and conducive to an irreparably mistaken identification that a defendant is denied due process of law.
8. **Identification Procedures.** Reliability is the linchpin in determining the admissibility of identification testimony.
9. **Criminal Law: Statutes: Legislature: Sentences.** Where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise.

Appeal from the District Court for Douglas County: MARLON A. POLK, Judge. Affirmed in part, sentence vacated in part, and cause remanded for resentencing.

Thomas C. Riley, Douglas County Public Defender, for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

HEAVICAN, C.J., WRIGHT, STEPHAN, MILLER-LERMAN, and CASSEL, JJ.

WRIGHT, J.

I. NATURE OF CASE

A jury convicted Trevelle J. Taylor of first degree murder and use of a deadly weapon to commit a felony. He was sentenced to life imprisonment and a consecutive sentence of 10 years' to 10 years' imprisonment, respectively. His convictions arose from his participation, at the age of 17 years, in the death of Justin Gaines. In this direct appeal, Taylor alleges several trial errors and claims his sentence of life imprisonment was

unconstitutional under *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). We affirm his convictions but remand the cause for resentencing on the conviction of first degree murder.

II. SCOPE OF REVIEW

[1] Apart from rulings under the residual hearsay exception, we will review for clear error the factual findings underpinning a trial court's hearsay ruling and review de novo the court's ultimate determination whether the court admitted evidence over a hearsay objection or excluded evidence on hearsay grounds. *State v. Scott*, 284 Neb. 703, 824 N.W.2d 668 (2012).

[2] "[A] district court's conclusion whether an identification is consistent with due process is reviewed de novo, but the court's findings of historical fact are reviewed for clear error." *State v. Nolan*, 283 Neb. 50, 61, 807 N.W.2d 520, 533 (2012), *cert. denied* ___ U.S. ___, 133 S. Ct. 158, 184 L. Ed. 2d 78.

[3] The constitutionality and construction of a statute are questions of law, regarding which we are obligated to reach conclusions independent of those reached by the court below. *Scott*, *supra*.

III. FACTS

On September 19, 2009, Catrice Bryson was standing outside a friend's house on Curtis Avenue in Omaha, Nebraska, when Gaines pulled into the driveway. Bryson and Gaines spoke for about 10 minutes, during which time Gaines remained seated in his vehicle. At one point during the conversation, Bryson went to her vehicle and reached into the middle console for a pen. When Bryson turned around to rejoin Gaines, she looked toward Curtis Avenue, saw two men with guns, and heard gunshots.

The two men were in the street behind Gaines' vehicle, one on the driver's side and one on the passenger side. The shooter on the driver's side was an African American with a "[l]ow haircut" and wore a brown shirt with orange writing on it. The shooter on the passenger side was a "light-skinned"

African American with long braids, a white basketball jersey, and a "do-rag."

Bryson heard Gaines say that he had been shot. She ran toward Gaines' vehicle, screaming for the shooters to stop and to leave Gaines alone. The shooter on the driver's side ran east along Curtis Avenue, and the shooter on the passenger side ran west. Gaines subsequently died from the injuries sustained in the shooting. An autopsy revealed that death was caused by a gunshot wound to the back.

After Omaha police officers arrived on the scene, they broadcast a description of one shooter as an African-American male with long braids, a white shirt, and jean shorts. Police also broadcast a description of a "possible suspect" white vehicle that did not have hubcaps.

As Officer Joel Strominger headed toward the location of the shooting, he saw a vehicle that matched the description of the white vehicle. Near the passenger side, he observed an African-American male who was wearing a white T-shirt and dark-colored shorts and had something brown in his hand. Strominger radioed a description of the person to other officers. At trial, Strominger identified Taylor as the person he had seen near the white vehicle.

When the white vehicle went west, and Taylor went east, Strominger followed the vehicle. Once he learned that the vehicle was reported stolen, he pulled it over on 42d Street near Curtis Avenue. Strominger held the lone occupant, Joshua Kercheval, at gunpoint until additional officers arrived to assist with an arrest.

Officer Jarvis Duncan and another officer responded to Strominger's description of the person seen near the white vehicle, and while traveling in the direction Strominger indicated the individual had gone, they saw an African-American male matching the description. As they stopped, the man, later identified as Taylor, started running. The officers caught him at Kercheval's house and placed him in handcuffs. Before he was apprehended, Taylor threw a brown shirt under a tree in the front yard of Kercheval's house. At trial, Bryson identified the shirt as the shirt worn by the shooter on the driver's side of Gaines' vehicle.

Duncan placed Taylor in the back seat of a police cruiser and took him to Strominger, who was five or six blocks away. Strominger immediately identified Taylor as the person he had seen by the white vehicle. No more than 10 minutes had elapsed since Strominger had seen Taylor next to the vehicle. Taylor was subsequently charged with first degree murder and use of a deadly weapon to commit a felony. Taylor's first trial resulted in a reversal on appeal to this court for the giving of an erroneous jury instruction. The cause was remanded for retrial. See *State v. Taylor*, 282 Neb. 297, 803 N.W.2d 746 (2011).

At Taylor's second trial, the State called several witnesses who, on the day of the shooting, had observed Taylor or an individual matching his description near Curtis Avenue. Alisha Hobson and Frances Fortenberry testified that right after they heard gunshots, they saw a man matching Taylor's description running along Curtis Avenue. Trisha Lade saw Taylor running along Vernon Avenue, which is near Curtis Avenue. She saw Taylor kneel behind some bushes and heard him yell into his cell phone, "[C]ome get me." Joseph Copeland testified that just after he heard gunfire, he saw an African-American male running along Redick Avenue, which is near Curtis Avenue.

The State also adduced evidence that more than 2 months after the shooting, Copeland's son found a gun hidden in the bushes or trees of a nearby school. The weapon was a semiautomatic 9-mm pistol. Three bullet casings recovered from the scene of the shooting were matched to the pistol.

Kercheval testified that on the day of the shooting, Taylor and Joshua Nolan came to his house; asked if he wanted to ride around in their vehicle, which was white; and then requested that he drive. The three drove around in the vehicle for about 1 hour before stopping at a convenience store from approximately 1:21 to 1:34 p.m. After they left the convenience store, Kercheval let Taylor out of the vehicle at 44th Street and Curtis Avenue so that Taylor could obtain some marijuana and Kercheval parked the vehicle on 45th Street. About 5 minutes later, Nolan exited the vehicle and headed down 45th Street toward Curtis Avenue.

Kercheval testified that about 2 minutes after Nolan left the vehicle, Kercheval heard approximately 10 gunshots and saw Nolan running toward the vehicle from the direction of Curtis Avenue. Kercheval explained that Nolan got into the vehicle, asked Kercheval to "drive off," and then got out of the vehicle at a school near 40th Street and Bauman Avenue. Shortly thereafter, Kercheval was pulled over by a police officer and arrested for driving a stolen vehicle.

The jury convicted Taylor of both charges. The district court sentenced him to life imprisonment for first degree murder and 10 years' to 10 years' imprisonment for use of a deadly weapon to commit a felony, to be served consecutively to the life sentence.

Taylor timely appeals. This court is required to hear appeals in cases in which a sentence of death or life imprisonment is imposed. See Neb. Rev. Stat. § 24-1106(1) (Reissue 2008).

IV. ASSIGNMENTS OF ERROR

Taylor assigns, consolidated and restated, that the district court erred in (1) allowing the State to present inadmissible hearsay regarding the location of the gun and (2) allowing Strominger to identify Taylor in court. Taylor also assigns that his sentence of life imprisonment was unconstitutional.

V. ANALYSIS

1. Testimony Regarding Location of 9-mm Pistol

(a) Hearsay

At trial, Copeland testified about the location of the gun found by his son a few months after the shooting. Copeland testified:

> [Prosecution:] Drawing your attention to November 27 of 2009, did you have the occasion to call police officers out to your residence at about 12:30 that afternoon?
>
> [Copeland:] Yes.
>
> Q. And could you tell us what you called officers out for?
>
> A. My son and a neighbor boy were playing down at the school flying an airplane, and in the process they'd

lost the airplane in the trees. And while looking for it, they found a gun in the trees, bushes.

Q. And did your son tell you about this gun or did he show you where the gun was?

A. He brought the gun to me.

Q. And did your son show you where he recovered the gun from?

A. Yes.

Q. And with regards to Exhibit 201, can you show us where your son told you — showed you he recovered the gun from?

[Defense counsel]: I'm going to object. It's hearsay.

[Prosecution]: I can restate.

THE COURT: Sustained.

Q. (By [prosecution]) Did your son physically take you to the location?

A. Yes.

Q. And so you physically went to that location?

A. Yes.

Q. And can you show us on Exhibit 201 what location you went to?

[Defense counsel]: Same thing, it's hearsay. [He is] trying to testify as to where the gun was located based on the testimony of someone who didn't locate the gun. So it's hearsay. The only way he knows where it was is hearsay, is what I'm saying, from the statement from the son.

THE COURT: Overruled. You may answer.

[Copeland]: On the corner of 40th and Mary. Right as you come around that corner, that house there, there's some bushes right there. Just right off the street. About six foot [sic] off the street.

Taylor alleges that Copeland's testimony where his son found the gun was inadmissible hearsay. The State concedes that Copeland's testimony regarding the exact location of the gun was inadmissible hearsay.

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Neb. Evid. R. 801(3),

Neb. Rev. Stat. § 27-801(3) (Reissue 2008). Under Neb. Evid. R. 802, Neb. Rev. Stat. § 27-802 (Reissue 2008), hearsay is not admissible unless a specific exception to the hearsay rule applies. The State does not argue that Copeland's statement fell within any of these exceptions.

Copeland's statement concerning the exact location of the gun should not have been admitted, because it was hearsay. His testimony that the gun was found at the corner of 40th and Mary Streets was based solely on the out-of-court statement of his son. Copeland did not personally find the gun. Copeland knew the precise location in which the gun was found only because his son communicated that information to Copeland.

(b) Harmless Error

The State maintains that admission of Copeland's testimony that the gun was found at the corner of 40th and Mary Streets was harmless error. Taylor claims the location of the gun was an essential part of the State's theory of the case and, therefore, its admission was not harmless error.

[4] Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error. *State v. Kitt*, 284 Neb. 611, 823 N.W.2d 175 (2012).

[5] We conclude that the admission of Copeland's testimony concerning the precise location of the gun was harmless error. The evidence was cumulative, and there was a substantial amount of other evidence that established Taylor's guilt. Erroneous admission of evidence is harmless error and does not require reversal if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact. *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006).

Taylor objected when Copeland was asked to identify the exact location where the gun was found. When the objection was overruled, Copeland stated that the gun was found

in the bushes at 40th and Mary Streets about 6 feet from the street. But Copeland had already testified without objection that his son and a neighbor found the gun while looking for their lost airplane in the trees at the school. He also testified without objection that on the day of the shooting, there was a lot of traffic around the school, indicating that the school was close to his home. Thus, evidence admitted without objection showed the gun was found near Copeland's home.

Taylor claims the admission of the hearsay was not harmless and urges this court to consider the State's closing argument, because it made several references to the 9-mm pistol. The State's closing argument referred to "the gun that [Taylor] ditched later on as he ran away from the murder." It also referred to the exact location of the gun. However, the fact that the gun was located precisely at 40th and Mary Streets was not vital to the State's case. The important fact was that the gun was found near Copeland's home, in the area where Copeland had seen someone running the day of the shooting. Evidence of that fact was admitted without objection.

Because evidence of the general location of the gun was received without objection, the subsequent hearsay was cumulative. Additionally, there was a substantial amount of other evidence that established Taylor's guilt.

Hobson, Fortenberry, and Lade testified that they saw someone matching Taylor's description in the area at the time of the shooting. Lade identified Taylor at trial. She also testified that on the day of the shooting, Taylor walked immediately in front of her as she pulled into her driveway. She heard him talking on his cell phone saying, "[W]here you at? Where you at? Come get me. I'm on 42nd." She testified that he then hid behind some bushes and that she heard Taylor say, "[C]ome get me" into his cell phone. Cell phone records indicated multiple calls between Taylor's telephone number and Nolan's telephone number around the time of the shooting. Convenience store surveillance video footage also placed Taylor with Nolan and Kercheval before the shooting occurred.

Taylor was apprehended shortly after the shooting, just several blocks away. At that time, Strominger identified Taylor

as the individual he saw near the white vehicle Kercheval was driving, which vehicle fit the description of the vehicle suspected to be involved in the shooting. Taylor's fingerprints were also found on a cup in the vehicle Kercheval was driving.

Shortly before being apprehended by police, Taylor discarded a brown shirt. Bryson, the eyewitness to the shooting, identified the shirt discarded by Taylor as the shirt worn by the shooter. Material found on Taylor's hands was identified as possibly coming from a firearm.

Because evidence of the general location of the gun was received without objection and the subsequent hearsay was cumulative and because there was a substantial amount of other evidence that established Taylor's guilt, the guilty verdict against Taylor was surely unattributable to the error in admitting Copeland's hearsay testimony that the gun was found at 40th and Mary Streets. Admitting the evidence of the gun's exact location was harmless error.

2. Strominger's Identification

Over Taylor's objection, the district court allowed Strominger to identify Taylor as the person he had seen next to the vehicle suspected to be involved in the shooting. Taylor claims the court erred in permitting this identification, because it was tainted by the circumstances surrounding Strominger's previous identification of Taylor. He contends that Strominger's identification on the day of the shooting was overly suggestive, because Taylor was taken to Strominger in handcuffs and because Strominger was told that Taylor had been arrested nearby and had discarded a brown shirt before his arrest. He claims Strominger's identification also was undermined by Kercheval's testimony that Taylor left the white vehicle before the shooting and that Kercheval did not see Taylor again until long after the shooting.

[6] Strominger's identification of Taylor was the result of a showup. A showup is usually defined as a one-on-one confrontation where the witness views only the suspect, and it is commonly conducted at the scene of the crime, shortly after the arrest or detention of a suspect and while the incident is

still fresh in the witness' mind. *State v. Garcia*, 235 Neb. 53, 453 N.W.2d 469 (1990).

[7] An identification procedure is constitutionally invalid only when it is so unnecessarily suggestive and conducive to an irreparably mistaken identification that a defendant is denied due process of law. *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005). See, also, *Perry v. New Hampshire*, 565 U.S. 228, 132 S. Ct. 716, 181 L. Ed. 2d 694 (2012). The admission of evidence of a showup does not, by itself, violate due process. See *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972). A determination of impermissible suggestiveness is based on the totality of the circumstances. See *id.*

The U.S. Supreme Court has stated a two-part test for determining the admissibility of an out-of-court identification: "First, the trial court must decide whether the police used an unnecessarily suggestive identification procedure. . . . If they did, the court must next consider whether the improper identification procedure so tainted the resulting identification as to render it unreliable and therefore inadmissible." *Perry*, 565 U.S. at 235.

[8] Reliability is the linchpin in determining the admissibility of identification testimony. *State v. Faust*, 269 Neb. 749, 696 N.W.2d 420 (2005). We have stated:

> The factors to be considered [in determining the reliability of a witness' identification] include (1) the opportunity of the witness to view the alleged criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of his or her prior description of the criminal, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and the confrontation. . . . Against these factors is to be weighed the corrupting influence of the suggestive identification itself.

Id. at 757, 696 N.W.2d at 427 (citations omitted).

We previously considered the constitutionality of a one-on-one identification in *State v. Wickline*, 232 Neb. 329, 440 N.W.2d 249 (1989), *disapproved on other grounds, State v. Sanders*, 235 Neb. 183, 455 N.W.2d 108 (1990). In *Wickline*, 232 Neb. at 335, 440 N.W.2d at 253, we concluded that the

identification of a defendant was not unduly suggestive where (1) the witness observed the defendant standing near a stolen vehicle and, a few minutes later, hiding behind a utility pole and (2) about 4 hours after initially observing the defendant, the same witness identified the defendant "without displaying or suggesting any uncertainty in her identification."

Strominger's identification of Taylor was made under circumstances comparable to those in *Wickline*, and we conclude that the identification of Taylor was not unduly suggestive or conducive to a mistaken identification. On the day of the shooting, Strominger observed a person outside a vehicle that may have been involved in the shooting. Within a matter of minutes, other police officers brought Taylor to Strominger's location. Strominger immediately identified Taylor as the person he had previously observed. Under these circumstances, Taylor was not denied due process of law. Strominger's identification was not unnecessarily suggestive or conducive to an irreparably mistaken identification.

Taylor emphasizes that he was handcuffed in the back of a police cruiser and that the officers who detained Taylor told Strominger that Taylor might be the person who ran from the white vehicle. But these facts do not render Strominger's identification unduly suggestive. Strominger was a police officer. His duties required him to identify suspects. As he was responding to a shooting, Strominger saw Taylor standing next to a vehicle that may have been involved in the shooting. Because Strominger thought Taylor also might have been involved in the shooting, Strominger provided a description of Taylor to other officers, who located Taylor based on that description. Then, during the initial minutes of the investigation, Strominger identified Taylor as the person he had observed near the suspect vehicle. This procedure was not unduly suggestive.

3. Sentence

Taylor was born in December 1991, and therefore, when the shooting occurred on September 19, 2009, he was under the age of 18 years. Because of his age, Taylor asserts that his sentence of life imprisonment was unconstitutional.

In *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), the U.S. Supreme Court concluded that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalties on juveniles. Accordingly, the Court held that mandatory sentences of life without parole for juveniles violated the Eighth Amendment's ban on cruel and unusual punishment.

Miller applies to cases that were on direct review when it was decided. See, *State v. Ramirez, ante* p. 356, 842 N.W.2d 694 (2014); *State v. Castaneda, ante* p. 289, 842 N.W.2d 740 (2014); *Whiteside v. State*, 2013 Ark. 176, 426 S.W.3d 917 (2013), *cert. denied* ___ U.S. ___, 134 S. Ct. 311, 187 L. Ed. 2d 220; *People v. Eliason*, 300 Mich. App. 293, 833 N.W.2d 357 (2013); *Hill v. Snyder*, No. 10-14568, 2013 WL 364198 (E.D. Mich. Jan. 30, 2013) (unpublished opinion). Taylor was sentenced in May 2012, and he appealed. *Miller* was decided that June. Because *Miller* was decided while Taylor's appeal was pending, its rule applies to him. See *Castaneda, supra*.

At the time Taylor was sentenced, Nebraska's statutes provided that a juvenile convicted of first degree murder was subject to mandatory life imprisonment. See Neb. Rev. Stat. §§ 28-105 (Cum. Supp. 2012) and 28-105.01 (Reissue 2008). The statutes did not expressly contain the qualifier "without parole." Nevertheless, because it provided no "meaningful opportunity" to obtain release, Nebraska's sentence of life imprisonment was effectively life imprisonment "without parole" under the rationale of *Miller* and *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). See *Castaneda, ante* at 314, 842 N.W.2d at 758.

We conclude that under *Miller*, Taylor's sentence of life imprisonment was unconstitutional. Because Taylor's life sentence was unconstitutional, it must be vacated and Taylor must be resentenced.

Taylor's resentencing is controlled by our recent decision in *Castaneda, supra*. In that case, we concluded that Neb. Rev. Stat. § 28-105.02 (Supp. 2013) applied to the resentencing of a defendant who was sentenced to life imprisonment without the possibility of parole for crimes he committed when he was

under the age of 18 years. Section § 28-105.02(1) provides that "the penalty for any person convicted of a Class IA felony for an offense committed when such person was under the age of eighteen years shall be a maximum sentence of not greater than life imprisonment and a minimum sentence of not less than forty years' imprisonment." When sentencing an individual under this statute, certain mitigating factors must be considered. See § 28-105.02(2). Section 28-105.02 was enacted after Castaneda and Taylor were sentenced for Class IA felonies but while their individual appeals were pending. See 2013 Neb. Laws, L.B. 44, § 2.

[9] The defendant in *Castaneda* argued, as does Taylor, that § 28-105.02 did not apply to him and that he should be sentenced for second degree murder. We rejected the argument of the defendant in *Castaneda* that § 28-105.02 increased the punishment available for his crime and concluded instead that the newly enacted statute did not violate ex post facto principles. We also determined that § 28-105.02 did not affect the elements of the offense or the facts necessary to establish guilt. "'[W]here a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise.'" *State v. Castaneda*, *ante* p. 289, 319, 842 N.W.2d 740, 762 (2014) (quoting *State v. Randolph*, 186 Neb. 297, 183 N.W.2d 225 (1971)). We vacated Castaneda's life sentences and remanded the cause for resentencing under the procedures set forth in § 28-105.02.

Taylor's arguments are identical to those which we rejected in *Castaneda*. Therefore, for the reasons explained in *Castaneda*, we conclude that § 28-105.02 applies to Taylor upon resentencing. We vacate Taylor's life sentence and remand the cause for resentencing under the procedures set forth in § 28-105.02.

VI. CONCLUSION

Taylor's assignments of error regarding alleged trial error are without merit, and we affirm his convictions. However, Taylor's sentence of life imprisonment was unconstitutional

and is therefore vacated. We remand the cause for resentencing by the district court as to Taylor's conviction for a Class IA felony. Taylor's sentence for use of a deadly weapon to commit a felony is affirmed and is to be consecutive to the sentence imposed by the district court on the murder conviction.

AFFIRMED IN PART, SENTENCE VACATED IN PART, AND CAUSE REMANDED FOR RESENTENCING.

CONNOLLY and MCCORMACK, JJ., participating on briefs.

JEANETTE CARNEY, APPELLEE, V.
JACQUELYN MILLER, APPELLANT.
842 N.W.2d 782

Filed February 14, 2014. No. S-12-1138.

1. **Jurisdiction: Appeal and Error.** An appellate court determines jurisdictional questions that do not involve a factual dispute as a matter of law.
2. **Summary Judgment: Immunity: Appeal and Error.** The district court's denial of summary judgment on grounds of qualified immunity is subject to de novo review.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.
4. **Final Orders: Appeal and Error.** Generally, only final orders are appealable.
5. ____: ____. Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), the three types of final orders that an appellate court may review are (1) an order that affects a substantial right and that determines the action and prevents a judgment, (2) an order that affects a substantial right made during a special proceeding, and (3) an order that affects a substantial right made on summary application in an action after a judgment is rendered.
6. **Summary Judgment: Final Orders.** An order denying summary judgment is not a final order under Neb. Rev. Stat. § 25-1902 (Reissue 2008).
7. **Final Orders.** The collateral order doctrine is an exception to the final order rule.
8. **Final Orders: Immunity: Appeal and Error.** Under the collateral order doctrine, the denial of a claim of qualified immunity is appealable, notwithstanding the absence of a final judgment, if the denial of immunity turns on a question of law.
9. ____: ____: ____. The denial of a claim of qualified immunity is immediately reviewable under the collateral order doctrine where the issues presented are purely questions of law.

10. **Civil Rights: Public Officers and Employees: Immunity.** Qualified immunity provides a shield from liability for public officials sued under 42 U.S.C. § 1983 (2006) in their individual capacity, so long as an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.
11. **Public Officers and Employees: Immunity.** Whether an official may prevail in his or her qualified immunity defense depends upon the objective reasonableness of his or her conduct as measured by reference to clearly established law.
12. **Trial: Immunity.** Where appropriate, the issues relating to qualified immunity may be determined via a separate trial or evidentiary hearing.
13. **Final Orders: Appeal and Error.** In order to determine whether a case presents an order reviewable under the collateral order doctrine, an appellate court engages in a three-part inquiry: (1) whether the plaintiff has alleged the violation of a constitutional right, (2) whether that right was clearly established at the time of the alleged violation, and (3) whether the evidence shows that the particular conduct alleged was a violation of the right at stake.
14. **Constitutional Law: Public Officers and Employees.** The identification of protected conduct is a two-step process. As a threshold matter, the speech must have addressed a matter of public concern. Then, the interest of the employee in so speaking must be balanced against the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.
15. **Constitutional Law.** The inquiry into the protected status of speech is one of law.
16. **Constitutional Law: Public Officers and Employees.** The content, form, and context of a given statement must be considered in determining whether an employee's speech addresses a matter of public concern.
17. ____: ____. To fall within the realm of public concern, an employee's speech must relate to a matter of political, social, or other concern to the community.
18. ____: ____. The public concern test functions to prevent every employee's grievance from becoming a constitutional case and to protect a public employee's right as a citizen to speak on issues of concern to the community.
19. ____: ____. When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.
20. ____: ____. First Amendment protection is not lost when a public employee communicates privately with his or her employer rather than choosing to spread his or her views before the public.
21. ____: ____. While a public employee does not give up his or her right to free speech simply because the employee's speech is private, the internal nature of the speech is a factor to be considered.
22. ____: ____. A public employee's speech on matters of purely personal interest or internal office affairs does not constitute a matter of public concern and is not entitled to constitutional protection.
23. ____: ____. The fundamental question in determining whether a public employee is speaking upon matters only of personal interest or upon matters of public

concern is whether the employee is seeking to vindicate personal interests or bring to light a matter of political, social, or other concern to the community.

24. ____: ____. Factors relevant in determining whether an employee's speech undermines the effective functioning of the public employer's enterprise are whether the speech creates disharmony in the workplace, impedes the speaker's ability to perform his or her duties, or impairs working relationships with other employees.
25. **Constitutional Law: Equal Protection: Public Officers and Employees.** A "class of one" equal protection claim is not cognizable in the public employment context.
26. **Constitutional Law: Public Officers and Employees.** A government official's conduct violates clearly established law when, at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable official would have understood that what he or she is doing violates that right.
27. ____: ____. If a reasonable official could have believed his or her conduct was lawful, the official's conduct does not violate clearly established law.
28. ____: ____. It is clearly established that a state may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech.
29. **Summary Judgment: Immunity: Appeal and Error.** A defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a genuine issue of fact for trial.
30. **Immunity: Pretrial Procedure: Appeal and Error.** A district court's pretrial rejection of a qualified immunity defense is not immediately appealable to the extent that it turns on either an issue of fact or an issue perceived by the trial court to be an issue of fact.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Reversed in part, and in part dismissed.

Jon Bruning, Attorney General, and John L. Jelkin for appellant.

Elaine A. Waggoner, of Waggoner Law Office, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

CASSEL, J.

I. INTRODUCTION

A nurse formerly employed by the State of Nebraska filed suit against a supervisor who terminated her employment, alleging violations of the 1st and 14th Amendments to the

U.S. Constitution. The supervisor asserted that she was entitled to qualified immunity and moved for summary judgment. The district court denied the motion, and the supervisor seeks an immediate appeal. We conclude that the employee did not establish a viable violation of her 14th Amendment rights and that the supervisor is entitled to qualified immunity on that claim. We reverse the district court's order to the extent that it denied the supervisor qualified immunity on the 14th Amendment claim. Because the employee's alleged First Amendment claim necessitates resolving a fact-related dispute, we conclude that the supervisor's appeal is not immediately reviewable under the collateral order doctrine on this issue and we dismiss the appeal as to this issue.

II. BACKGROUND

In June 2002, Jeanette Carney began her employment as a "Community Health Nurse III" with Every Woman Matters, a program of the Department of Health and Human Services (DHHS). Her job duties included initiating a Medicaid treatment application upon receipt of documentation of a qualifying diagnosis from a physician, verifying that a potential recipient met the eligibility requirements under the Every Woman Matters policies and protocols, and ensuring that all necessary documentation was obtained before the applications were submitted to Medicaid.

In November 2004, Jacquelyn Miller became a deputy director at DHHS. At all relevant times, Miller was either Carney's second- or third-line supervisor. Melissa Leypoldt was Carney's immediate supervisor from June 2002 until June 20, 2006, and Leypoldt's immediate supervisor was Kathy Ward. Miller was Ward's immediate supervisor.

On several occasions in 2005, Carney informed Miller of issues relating to the Every Woman Matters program. Carney told Miller that certain individuals who had been determined to be eligible for Medicaid were disqualified by Leypoldt. In May, Carney wrote to and spoke with Miller regarding Leypoldt's removal of an individual from Medicaid eligibility during the midst of treatment, which Carney claimed was contrary to law and regulation. In December, she spoke with

Miller about Leypoldt's alleged misapplication of statutes, regulations, and policies.

On February 10, 2006, Leypoldt placed Carney on investigatory suspension with pay. According to the suspension letter, Leypoldt was concerned about Carney's judgment in approving claims for payment of medical expenses. On February 16, Carney filed a grievance regarding the suspension. Following a hearing, the hearing officer ultimately found, among other things, that DHHS had properly applied the provisions of the labor contract with regard to Carney's investigatory suspension and had acted in good faith and not exceeded its authority in suspending Carney.

On March 16, 2006, Carney was served with a "Written Notice of Allegations." The allegations included that Carney failed to consistently follow program protocols for assessing and certifying individuals for Medicaid, that she inappropriately extended eligibility for Medicaid benefits without the proper documentation to make an informed decision, that she used her state e-mail for personal reasons, and that she used her state computer and Internet access for purposes unrelated to her work. Leypoldt noted on the document that "Carney refused to sign stating[,] 'This is retaliation.'"

On May 5, 2006, Carney filed a charge of discrimination with the Nebraska Equal Opportunity Commission (NEOC) alleging retaliation, discrimination based on disability, and whistleblower violations. She claimed that beginning in approximately 2003, she made multiple requests to work from home as an accommodation due to her disability and the disability of her husband. Carney also stated that Leypoldt asked her to violate "Nebraska Code 469," that Carney refused, that Carney reported Leypoldt to Medicaid, and that Carney was "written up" by Leypoldt as a result. Carney further stated that she reported Leypoldt's use of money to Nebraska's Auditor of Public Accounts in March 2006 and reported Leypoldt's overruling of doctors' decisions about cancer treatment to Nebraska's Board of Nursing in approximately April.

On June 19, 2006, a notice of discipline was issued to Carney based on her failure to consistently follow program protocols for assessing and certifying clients for Medicaid under

the Medicaid treatment program, her inappropriately extending eligibility for Medicaid benefits without proper documentation, and her inappropriate use of the worksite computer. The notice of discipline subjected her to a salary reduction and 6 months' probation. Carney filed a grievance. Following a hearing, the hearing officer found that the discipline was not based on just cause and did not represent the application of progressive discipline. The hearing officer allowed the 6-month disciplinary probation and work improvement plan to stand but ordered DHHS to rescind the reduction in pay, return the lost pay to Carney, and substitute the discipline with a suspension of up to 5 days without pay.

On July 10, 2006, Carney filed a third grievance, alleging retaliation, disrespectful treatment, and discrimination. Following a hearing, the hearing officer found that DHHS had not violated the labor contract and had not discriminated against Carney. The hearing officer reasoned that although the majority of employees are allowed to work from home, "it is management's right to approve/disapprove a request to work from home" and that "management has chosen to display close supervision of [Carney] and has denied her request to work at home based on this."

On August 2, 2006, Carney filed a second charge with the NEOC against DHHS alleging retaliation and discrimination based on disability. She amended the charge on January 3, 2007, to add claims of disability by association and failure to accommodate.

On December 26, 2006, Carney submitted an "Application for Work at Home" for the first time. On January 8, 2007, she sent an e-mail to Miller and others complaining that she was being punished and retaliated against. On January 11, Carney sent Ward an e-mail at the end of the day stating: "'Everything I did here today I could have done from anywhere else in the world. Including my home.'" On that same day, a coworker sent Ward an e-mail complaining about difficulty in getting Carney to cover the nurses' voice mail box.

On January 29, 2007, Carney sent Miller an e-mail regarding a client's not being sent an application from the Every Woman Matters program and, as a result, having her wages

garnished to pay for tests which should have been covered by the program. On February 13, Carney sent an e-mail to Miller which began:

> I know that I have shared a number of things with you already that are of a great concern to me regarding how things are managed around here (the Komen grant with [Leypoldt's] taking the $973, the $250,000 overspen[t] by [Leypoldt] in fall of '05, her refusal to let women submit Medicaid applications when their physicians have recommended treatment, the altering of medical records, etc.), but I have another big one. The colon cancer demonstration program.

Carney then stated that she overheard the "'host'" of a conference call with the "CDC" tell Leypoldt that Nebraska had not participated in the last three calls. In another e-mail to Miller on the same date, Carney complained about a misapplication of policy by Leypoldt with regard to women diagnosed with "HPV."

On February 20, 2007, Carney communicated to Miller further alleged breaches of policy application by Leypoldt and Ward. On February 21, Carney's work computer was audited for usage for the period of January 31 through February 21. Results showed that Carney used her state e-mail account and state computer for personal purposes.

On March 12, 2007, Miller denied Carney's December 2006 home office request.

On March 22, 2007, Ward gave Carney a "Written Notice of Allegations." The document stated that Carney's behavior was causing continuous disruption in the workplace, resulting in a failure to maintain appropriate working relationships with coworkers and supervisors. It identified e-mails sent by Carney indicating intent to cause disruption. Another allegation in the document was that Carney was not completing the work assigned to her. The document also alleged that Carney was inappropriately using the state-owned computer and Internet access for purposes not related to state business.

On May 1, 2007, Ward received an e-mail from Carney asking why Carney was not allowed to work at home. Ward

responded that she had concerns about Carney's work performance and was not willing to have her work independently at home.

On July 12, 2007, a coworker reported to Ward that she was helping Carney enter patient data from file drawers assigned to Carney and that some documents dated back to May 23. The timeline standard for data entry was 2 weeks from the date that documents were received.

On July 25, 2007, Carney met with Ward, Miller, and a representative from human resources and was given her "Notice of Discipline — Termination." Miller ultimately made the decision to terminate Carney's employment.

On June 11, 2008, the NEOC found that the evidence was insufficient to support Carney's allegations of discrimination and made determinations of "no reasonable cause" on each of Carney's cases.

On July 18, 2011, Carney filed a lawsuit against Miller in Miller's individual capacity. She filed an amended complaint on October 28. Carney stated that she brought the action to redress her civil rights under (1) the 1st Amendment to the U.S. Constitution, providing protection for free speech; (2) the 14th Amendment, providing for due process and equal protection; (3) 42 U.S.C. § 1983 (2006), providing for redress of deprivation of her civil rights and providing for damages; (4) 42 U.S.C. § 1988 (2006), providing for attorney fees; and (5) the common law of Nebraska, providing for protections from any deprivation of rights. She subsequently moved to dismiss all due process claims and reserved for trial the claims involving First Amendment speech and retaliation and equal protection under the federal and state Constitutions.

Carney alleged that she spoke out on matters of public concern by opposing wrongful cancellation of services to clients and by filing grievances and claims of discrimination. She alleged that she was treated differently than similarly situated employees who had not opposed unlawful activity. Carney alleged that Miller knew at the time of Carney's termination of employment that Carney had been treated differently than other similarly situated employees who had not engaged

in protected speech. Carney claimed that she had been subjected to retaliatory discipline actions because of the protected speech and that other similarly situated employees who had not engaged in protected speech were allowed to work at home, contrary to articulated policies.

Miller filed a motion to dismiss under Neb. Ct. R. Pldg. § 6-1112(b)(1) and (6). She alleged that the court lacked subject matter jurisdiction over her because as a state employee, she was entitled to claim qualified immunity. Miller also claimed that the amended complaint failed to state a claim upon which relief could be granted and that some or all of the claims were barred by the statute of limitations. The district court overruled the motion.

Miller subsequently filed a responsive pleading and set forth a number of affirmative defenses. She alleged that her actions were objectively reasonable and that, therefore, as a state employee, she was entitled to the defense of qualified immunity. Miller again alleged that Carney's claims were barred by the statute of limitations. Miller subsequently moved for summary judgment based upon qualified immunity. She claimed that there was no violation of Carney's right of free speech, because Carney spoke as an employee of the State of Nebraska, Carney's speech was related to her employment, and any violation of Carney's right of free speech was not clearly defined so that a reasonable supervisor would know that Carney's rights were being violated.

Carney testified in a deposition that sometime in 2005 and also on February 10, 2006, she formed the opinion that Miller was violating her right of free speech. She testified that she first became aware that Miller had violated her right to equal protection in the spring of 2005 and February 10, 2006.

Evidence adduced during the summary judgment hearing established that Carney claimed Miller violated her constitutional right to free speech by providing advice to Ward and Leypoldt regarding preparation of the "Written Notice of Allegations," imposition of probation, and termination of Carney's employment. Carney asserted that Miller violated her constitutional right to equal protection by, among other things, not allowing her to work from home as other

employees were allowed, consenting to the imposition of the "Written Notice of Allegations" and disciplinary action, consenting to require Carney to produce more documentation than other employees to be able to receive sick-time pay, communicating negative information to human resources to prevent Carney from being able to work at home, and terminating her employment. According to Carney, most employees who had been permitted to work from home did not fill out an application to do so. When asked what Miller did that violated Carney's right to equal protection, Carney answered, "She knew that I had requested reasonable accommodation, she knew that I had felt that I was singled out and treated differently, she knew that I felt that other women were being denied service, and she didn't do anything about it, and that's a violation."

On December 3, 2012, the court entered an order overruling Miller's motion for summary judgment. The court found that numerous material factual disputes existed, which prevented judgment as a matter of law. Specifically, the court stated:

> Material questions of fact exist and the inferences to be drawn from the facts presented by the parties, including undisputed facts, are not clear with regard to the following aspects of the case: whether [Carney] engaged in conduct or activity protected by the First Amendment; and whether the protected conduct was a substantial or a motivating factor in [Miller's] participation in adverse employment action against [Carney]. Likewise, whistleblower status has been recognized as a protected class for an equal protection claim arising out of employment. Material questions of fact exist regarding whether [Carney] is a member of a protected class of persons known as whistleblowers; whether [Miller] treated [Carney] differently in an important aspect of her employment as a result of her membership; the nature of the governmental interest and purpose involved; whether under all the circumstances [Miller's] conduct was reasonable; whether [Miller] would have discharged [Carney] regardless of her exercise of her right to free

> speech; whether [Carney's] communications with her supervisors cause disharmony or disruption in the workplace; and whether [Carney's] communications with her supervisors impair her ability to perform her duties.

Thus, the court overruled Miller's motion for summary judgment. Miller appealed.

III. ASSIGNMENTS OF ERROR

Miller assigns that the district court erred when it failed to (1) conduct an appropriate qualified immunity analysis and (2) find that Carney's claims are barred by the statute of limitations.

IV. STANDARD OF REVIEW

[1] An appellate court determines jurisdictional questions that do not involve a factual dispute as a matter of law.[1]

[2] The district court's denial of summary judgment on grounds of qualified immunity is subject to de novo review.[2]

V. ANALYSIS

1. Final Order

[3-5] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.[3] Generally, only final orders are appealable.[4] Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), the three types of final orders that an appellate court may review are (1) an order that affects a substantial right and that determines the action and prevents a judgment, (2) an order that affects a substantial right made during a special proceeding, and (3) an order that affects a substantial right made on summary application in an action after a judgment is rendered.[5]

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[1] *Sutton v. Killham*, 285 Neb. 1, 825 N.W.2d 188 (2013).

[2] *Sparr v. Ward*, 306 F.3d 589 (8th Cir. 2002).

[3] *Sutton v. Killham*, *supra* note 1.

[4] *Id.*

[5] *Id.*

[6] An order denying summary judgment is not a final order under § 25-1902.[6] Here, the order denying summary judgment did not determine the action or prevent a judgment; instead, it allowed Carney's action against Miller to proceed. Further, a summary judgment motion does not invoke a special proceeding.[7] Instead, a summary judgment proceeding is a step in the overall action.[8] And as a step in an action, a motion for summary judgment is not a summary application made in an action after a judgment is rendered.[9] Accordingly, the order in this case which denied Miller's motion for summary judgment is not a final order.

2. Collateral Order Doctrine

[7-9] The collateral order doctrine is an exception to the final order rule.[10] Under the doctrine, the denial of a claim of qualified immunity is appealable, notwithstanding the absence of a final judgment, if the denial of immunity turns on a question of law.[11] We have emphasized that the denial of a claim of qualified immunity is immediately reviewable under the collateral order doctrine where the issues presented are purely questions of law.[12]

[10-12] Qualified immunity provides a shield from liability for public officials sued under § 1983 in their individual capacity, so long as an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.[13] Whether an official may prevail in his or her qualified immunity defense depends upon the objective reasonableness of his or her conduct as measured by reference to clearly established law.[14] Where

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[6] See *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007).

[7] *Big John's Billiards v. State*, 283 Neb. 496, 811 N.W.2d 205 (2012).

[8] *Id.*

[9] *Id.*

[10] See *Williams v. Baird*, 273 Neb. 977, 735 N.W.2d 383 (2007).

[11] *Id.*

[12] See *id.*

[13] *Id.*

[14] *Id.*

appropriate, the issues relating to qualified immunity may be determined via a separate trial or evidentiary hearing.[15]

[13] In order to determine whether a case presents an order reviewable under the collateral order doctrine, an appellate court engages in a three-part inquiry.[16] First, we determine whether the plaintiff has alleged the violation of a constitutional right.[17] Second, we determine whether that right was clearly established at the time of the alleged violation.[18] Finally, we determine whether the evidence shows that the particular conduct alleged was a violation of the right at stake.[19] The first two inquiries are questions of law; the last could require factual determinations to the extent that evidence is in conflict.[20]

(a) Carney's Allegations

We first consider whether Carney alleged a viable violation of a constitutional right. In Carney's complaint, she asserted violations of her 1st Amendment right to freedom of speech and her 14th Amendment right to equal protection under the law. She claimed that she spoke out on matters of public concern by opposing wrongful cancellation of services to clients and by filing grievances and claims of discrimination, that she was treated differently than similarly situated employees who had not opposed unlawful activity, and that Miller acted intentionally to deprive Carney of her rights to equal protection while engaging in protected speech. Carney further claimed that she had been subjected to retaliatory disciplinary actions because of protected speech, that other similarly situated employees who had not engaged in protected speech were allowed to work at home contrary to articulated policies, and that Miller willingly participated in the unlawful

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[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

termination of Carney's employment despite knowing that the termination was a violation of equal protection.

(i) First Amendment

[14] The identification of protected conduct is a two-step process. As a threshold matter, the speech must have addressed a matter of public concern. Then, the interest of the employee in so speaking must be balanced against the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.[21]

a. Whether Speech Addressed Matter of Public Concern

[15] A threshold question is whether the employee's speech may be fairly characterized as constituting speech on a matter of public concern.[22] According to Carney, the matters of public concern upon which she spoke were opposing wrongful cancellation of services to clients and filing internal grievances with DHHS and claims of discrimination with the NEOC. The district court made no finding on whether such speech addressed a matter of public concern. But the inquiry into the protected status of speech is one of law.[23] As the U.S. Supreme Court explained regarding the inquiry into whether speech addresses a matter of public concern:

> If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. . . . If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.[24]

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[21] *Fraternal Order of Police v. County of Douglas*, 270 Neb. 118, 699 N.W.2d 820 (2005).

[22] See *Rankin v. McPherson*, 483 U.S. 378, 107 S. Ct. 2891, 97 L. Ed. 2d 315 (1987).

[23] *Fraternal Order of Police v. County of Douglas*, *supra* note 21.

[24] *Garcetti v. Ceballos*, 547 U.S. 410, 418, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006).

[16-19] The content, form, and context of a given statement must be considered in determining whether an employee's speech addresses a matter of public concern.[25] To fall within the realm of public concern, an employee's speech must relate to a matter of political, social, or other concern to the community.[26] The public concern test functions to prevent every employee's grievance from becoming a constitutional case and to protect a public employee's right as a citizen to speak on issues of concern to the community.[27] When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.[28]

i. Opposing Cancellation of Services to Clients

[20,21] Carney's complaints about the cancellation of services to clients were made to Miller and were not aired in a public forum. First Amendment protection is not lost when a public employee communicates privately with his or her employer rather than choosing to spread his or her views before the public.[29] While a public employee does not give up his or her right to free speech simply because the employee's speech is private, the internal nature of the speech is a factor to be considered.[30] But the matter upon which Carney spoke was of interest to the community at large and not relevant only to Carney's fellow employees. And by speaking out on behalf of clients, it is clear that Carney's statements did not concern a matter of interest to her alone. We conclude that Carney was speaking more as a concerned public citizen than as an

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[25] *Fraternal Order of Police v. County of Douglas*, *supra* note 21.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] See *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 99 S. Ct. 693, 58 L. Ed. 2d 619 (1979).

[30] See *Sparr v. Ward*, *supra* note 2.

employee and, thus, that her speech regarding the allegedly wrongful cancellation of services to clients touched upon matters of public concern.

ii. Grievances and NEOC Claims

[22,23] Carney claimed that her internal grievances and her claims filed with the NEOC were matters of public concern. A public employee's speech on matters of purely personal interest or internal office affairs does not constitute a matter of public concern and is not entitled to constitutional protection.[31] The U.S. Supreme Court has stated:

> [W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.[32]

"The fundamental question is whether the employee is seeking to vindicate personal interests or bring to light a matter of political, social, or other concern to the community."[33] Carney's internal grievances and NEOC complaints cannot be fairly considered as relating to any matter of political, social, or other concern to the community. Her purpose in speaking was directed to her self-interest rather than to the public interest. Because we conclude this speech did not touch on a matter of public concern, Carney has no First Amendment cause of action based on her employer's reaction to the speech.[34]

b. Balancing of Interests

[24] Because we determined that Carney's speech on the cancellation of services to clients was a matter of public concern, we proceed to balance her employer's interest in

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[31] *Cahill v. O'Donnell*, 75 F. Supp. 2d 264 (S.D.N.Y. 1999).

[32] *Connick v. Myers*, 461 U.S. 138, 147, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983).

[33] *Cahill v. O'Donnell*, *supra* note 31, 75 F. Supp. 2d at 272.

[34] See *Garcetti v. Ceballos*, *supra* note 24.

"promoting the efficiency of the public services it performs through its employees."[35] Factors relevant in determining whether an employee's speech undermines the effective functioning of the public employer's enterprise are whether the speech creates disharmony in the workplace, impedes the speaker's ability to perform his or her duties, or impairs working relationships with other employees.[36] It appears that Miller did not present any specific evidence to demonstrate that Carney's speech adversely affected the efficiency of the Every Woman Matters program and substantially disrupted the work environment.

(ii) 14th Amendment

[25] We are not entirely clear on the basis for Carney's 14th Amendment claim, and unfortunately, her brief contains no argument concerning an alleged violation of that amendment. Carney does not assert in her complaint that she is a member of a protected class on the basis of her race, color, religion, sex, disability, or national origin. The district court stated in its order that whistleblower status has been recognized as a protected class, but the court made no finding regarding whether Carney was a whistleblower. We observe that the Fifth Circuit has rejected an argument that whistleblowers are a protected class for purposes of 42 U.S.C. § 1985 (2006).[37] And the U.S. Supreme Court has held that a "class of one" equal protection claim is not cognizable in the public employment context.[38] Accordingly, Carney has not alleged a viable violation of her 14th Amendment rights and Miller is entitled to qualified immunity on this claim. We therefore reverse in part the district court's order denying Miller's motion for summary judgment.

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[35] *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968).

[36] See *Kincade v. City of Blue Springs, Mo.*, 64 F.3d 389 (8th Cir. 1995).

[37] See *Bryant v. Military Department of Mississippi*, 597 F.3d 678 (5th Cir. 2010).

[38] See *Engquist v. Oregon Dept. of Agriculture*, 553 U.S. 591, 128 S. Ct. 2146, 170 L. Ed. 2d 975 (2008).

(b) Whether First Amendment Right Was Clearly Established

[26-28] Because Carney alleged a cognizable First Amendment violation, we must determine whether her free speech rights were clearly established at the time. "A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he [or she] is doing violates that right.'"[39] A case does not need to be directly on point, but existing precedent must have placed the constitutional question beyond debate.[40] If a reasonable official could have believed his or her conduct was lawful, the official's conduct does not violate clearly established law.[41] It is clearly established that a state may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech.[42] In *Kincade v. City of Blue Springs, Mo.*,[43] the appellants argued that they were entitled to qualified immunity because the state of the law was unclear regarding whether a public employee can speak on matters of public concern when the speech is made in the employee's capacity as a public employee. The Eighth Circuit rejected the argument, stating that the case law at the time of the employee's termination made clear that speech touches upon a matter of public concern when it deals with issues of interest to the community. Similarly, we conclude that at the time of Carney's termination of employment, the law was clearly established that a public employee cannot be terminated for speaking about a matter of public concern.

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[39] *Ashcroft v. al-Kidd*, 563 U.S. 731, 131 S. Ct. 2074, 2083, 179 L. Ed. 2d 1149 (2011).

[40] See *id.*

[41] See *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987).

[42] *Rankin v. McPherson*, *supra* note 22.

[43] *Kincade v. City of Blue Springs, Mo.*, *supra* note 36.

(c) Whether Conduct Was Violation of Right

Finally, we reach the last step in the three-part inquiry into whether the collateral order doctrine applies.[44] This step calls for a determination of whether the evidence shows that the particular conduct alleged was a violation of the right at stake.[45] And, as we noted earlier, this inquiry could require factual determinations to the extent that evidence is in conflict.[46]

[29,30] The district court found, and we agree, that genuine issues of fact exist. The U.S. Supreme Court has held that "a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial."[47] Here, the district court noted the existence of numerous material factual disputes. "'[A] district court's pretrial rejection of a qualified immunity defense is not immediately appealable to the extent that it turns on either an issue of fact or an issue perceived by the trial court to be an issue of fact.'"[48] The district court's denial of Miller's motion did not turn on a purely legal question. Instead, the court's order determined that several material issues of fact existed, including whether Miller's conduct was reasonable. Such an order is not immediately appealable.[49] Accordingly, as to Carney's First Amendment claim, we dismiss the appeal for lack of jurisdiction.

VI. CONCLUSION

We conclude that Carney did not allege a viable violation of her 14th Amendment rights and that Miller is entitled to qualified immunity on that claim. We therefore reverse in part

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[44] See *Williams v. Baird, supra* note 10.

[45] See *id.*

[46] See *id.*

[47] *Johnson v. Jones*, 515 U.S. 304, 319-20, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995).

[48] *Williams v. Baird, supra* note 10, 273 Neb. at 985, 735 N.W.2d at 391, quoting *Stella v. Kelley*, 63 F.3d 71 (1st Cir. 1995).

[49] See *Johnson v. Jones, supra* note 47.

the district court's order denying Miller's motion for summary judgment. We conclude that Carney alleged a cognizable First Amendment violation and that the right was clearly established. However, we conclude that the district court's order denying Miller's motion for summary judgment on that issue is not immediately reviewable under the collateral order doctrine, because the matter presents factual issues and not a purely abstract issue of law.

REVERSED IN PART, AND IN PART DISMISSED.

JOEL DELEON, APPELLEE, V. REINKE MANUFACTURING COMPANY, APPELLANT.

843 N.W.2d 601

Filed February 14, 2014. No. S-13-015.

1. **Workers' Compensation: Appeal and Error.** A judgment, order, or award of the Workers' Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. The findings of fact made by a workers' compensation trial judge will not be disturbed on appeal unless clearly wrong.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
4. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not interpret the meaning of statutory words which are plain, direct, and unambiguous.
5. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken. Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), an order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.
6. **Workers' Compensation: Appeal and Error.** Workers' compensation proceedings are special proceedings for purposes of appellate review.

Appeal from the Workers' Compensation Court: JOHN R. HOFFERT, Judge. Affirmed in part, and in part dismissed.

Benjamin E. Maxell and Aimee C. Bataillon, of Adams & Sullivan, P.C., for appellant.

Lee S. Loudon and Ami M. Huff, of Law Office of Lee S. Loudon, P.C., L.L.O., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

STEPHAN, J.

Reinke Manufacturing Company (Reinke) appeals from two orders entered by the Nebraska Workers' Compensation Court. We conclude we have no jurisdiction to review one of the orders because it did not affect a substantial right and was therefore not appealable. We have jurisdiction to review the second order, but we conclude that Reinke's assignments of error with respect to that order are without merit.

I. BACKGROUND

1. 2010 AWARD

On or about January 30, 2009, Joel Deleon was injured during the course and scope of his employment with Reinke. He sought and was awarded workers' compensation benefits for injuries to his elbows and shoulders and his resulting depression. The award was entered by the compensation court on August 13, 2010, and summarily affirmed on appeal by the Nebraska Court of Appeals on August 12, 2011, in case No. A-11-261.

The award specifically found that Deleon had suffered compensable physical injuries to his elbows and shoulders. It also specifically found that the pain and disability from those physical injuries caused Deleon to suffer a compensable psychiatric injury of depression. The award provided that Deleon was "entitled to weekly temporary total disability benefits of $378.85 from and after March 25, 2009, through the date of trial and continuing into the future until such time as [he] has reached maximum medical improvement from all of his injuries." The award deferred determination of Deleon's entitlement to permanent disability benefits until "such time as all injuries have reached maximum medical improvement."

2. Motion to Compel Payment of Indemnity

On September 17, 2012, Deleon filed a motion alleging that Reinke was not paying temporary total disability in compliance with the 2010 award. He sought an order from the compensation court compelling those payments, imposing a waiting-time penalty, and awarding attorney fees. At an evidentiary hearing on the motion, the parties stipulated that Deleon reached maximum medical improvement for all of his injuries on August 30. Reinke argued, however, that Deleon reached maximum medical improvement for his physical injuries on November 30, 2010, and that it was not required to pay temporary total disability beyond that date. Reinke acknowledged that it had unilaterally stopped making payments to Deleon as of November 30.

In its order sustaining the motion, the compensation court found that its 2010 award clearly entitled Deleon to receive temporary total disability payments until he reached maximum medical improvement for both the physical injuries and the psychiatric injury and ordered Reinke to pay temporary total disability through August 30, 2012. In doing so, the court treated the parties' stipulation as "negating the need for [Reinke] to have filed a Petition for Modification so as to terminate its ongoing liability" for temporary total disability payments. The court also found there was no reasonable controversy as to whether Deleon was entitled to temporary total disability payments through August 30 and imposed a 50-percent waiting-time penalty on Reinke. The court also awarded Deleon attorney fees of $1,000. This order was entered on December 3, 2012.

3. Motion for Loss of Earning Capacity and Vocational Rehabilitation Evaluation

Deleon filed a petition to modify the 2010 compensation award on September 5, 2012. In this petition, he alleged he had suffered an increase in his incapacity due solely to injuries that were the subject of the original award and asked the court to, inter alia, determine his permanent disability and his

entitlement to vocational rehabilitation benefits. Subsequently, Deleon filed a motion requesting that a court-appointed vocational rehabilitation counselor be directed to prepare a loss of earning capacity and vocational rehabilitation evaluation. Reinke resisted this motion, arguing that no evaluation should be performed because Deleon's injuries were to scheduled members of his body and the impairment ratings given by his treating doctors did not equal at least 30 percent.[1]

The compensation court sustained Deleon's motion to have the vocational rehabilitation counselor evaluate his loss of earning capacity and entitlement to vocational rehabilitation benefits. In its order, the court emphasized that it was making no determination as to Deleon's ultimate entitlement to any loss of earning capacity or vocational rehabilitation benefits, noting that these issues would be determined in the contested and pending motion to modify the award. This order was also entered on December 3, 2012.

4. Appeal

On December 31, 2012, Reinke filed one notice of appeal, stating it was appealing from both of the orders entered by the compensation court on December 3. We moved the appeal to our docket on our own motion pursuant to our authority to regulate the caseloads of the appellate courts of this state.[2]

II. ASSIGNMENTS OF ERROR

Reinke assigns, restated and consolidated, that the Workers' Compensation Court erred in finding Deleon was entitled to (1) receive temporary total disability benefits after reaching maximum medical improvement for his physical injuries, (2) a waiting-time penalty, (3) an award of attorney fees, and (4) a loss of earning capacity and vocational rehabilitation evaluation conducted by the vocational rehabilitation counselor.

III. STANDARD OF REVIEW

[1,2] A judgment, order, or award of the Workers' Compensation Court may be modified, reversed, or set aside

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[1] See Neb. Rev. Stat. § 48-121(3) (Reissue 2010).

[2] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.[3] The findings of fact made by a workers' compensation trial judge will not be disturbed on appeal unless clearly wrong.[4]

A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.[5] Regarding questions of law, an appellate court in workers' compensation cases is obligated to make its own decisions.[6]

IV. ANALYSIS

1. Appellate Jurisdiction

[3] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[7] Deleon argues that we lack jurisdiction to review both the order enforcing the 2010 award and the order directing a loss of earning power and vocational rehabilitation evaluation. We examine these arguments in turn.

(a) Order Enforcing 2010 Award

Prior to 2011, appeals from trial court decisions of the Workers' Compensation Court were made to a workers' compensation review panel and had to be filed within 14 days of

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[3] *Hynes v. Good Samaritan Hosp.*, 285 Neb. 985, 830 N.W.2d 499 (2013); *Smith v. Mark Chrisman Trucking*, 285 Neb. 826, 829 N.W.2d 717 (2013).

[4] See, *Hynes v. Good Samaritan Hosp.*, *supra* note 3; *Pearson v. Archer-Daniels-Midland Milling Co.*, 285 Neb. 568, 828 N.W.2d 154 (2013).

[5] *Butler Cty. Sch. Dist. v. Freeholder Petitioners*, 286 Neb. 814, 839 N.W.2d 316 (2013); *Holdsworth v. Greenwood Farmers Co-op*, 286 Neb. 49, 835 N.W.2d 30 (2013).

[6] *Holdsworth v. Greenwood Farmers Co-op*, *supra* note 5; *Visoso v. Cargill Meat Solutions*, 285 Neb. 272, 826 N.W.2d 845 (2013).

[7] *Becerra v. United Parcel Service*, 284 Neb. 414, 822 N.W.2d 327 (2012); *Big John's Billiards v. State*, 283 Neb. 496, 811 N.W.2d 205 (2012).

the trial court's decision.[8] Now, appeals from trial court decisions of the Workers' Compensation Court are made directly to the Court of Appeals or to this court.[9] When the Legislature changed the appeal process, it specifically provided that the changes did not apply to "[c]ases pending before the Nebraska Workers' Compensation Court on August 27, 2011, in which a hearing on the merits has been held . . . ."[10] Instead, the new appeal process applied only to "[a]ny cause of action not in suit on August 27, 2011, and any cause of action in suit in which a hearing on the merits has not been held prior to such date . . . ."[11]

Deleon contends that because his motion to compel is simply a means of enforcing the 2010 award, the requisite "hearing on the merits" was the May 10, 2010, hearing which preceded the imposition of the 2010 award. He argues that because this hearing date came before the August 27, 2011, statutory cutoff date, Reinke should have filed its appeal with the workers' compensation review panel, not with the Court of Appeals.

[4] We reject this argument. Statutory language is to be given its plain and ordinary meaning, and an appellate court will not interpret the meaning of statutory words which are plain, direct, and unambiguous.[12] The plain meaning of "hearing on the merits" relative to this appeal is the October 11, 2012, hearing which preceded the issuance of the December 3 order from which Reinke appeals. Because that hearing occurred after the August 27, 2011, statutory deadline, Reinke properly filed its appeal with the Court of Appeals.

(b) Order for Evaluation

[5,6] Deleon argues that we lack jurisdiction over the appeal from the order directing the vocational counselor to evaluate

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[8] See Neb. Rev. Stat. § 48-179 (Reissue 2010) (repealed 2011 Neb. Laws, L.B. 151, § 20).

[9] See Neb. Rev. Stat. § 48-185 (Cum. Supp. 2012).

[10] Neb. Rev. Stat. § 48-1,112 (Cum. Supp. 2012).

[11] *Id.*

[12] See *State v. Sikes*, 286 Neb. 38, 834 N.W.2d 609 (2013).

Deleon's loss of earning power and entitlement to vocational rehabilitation because it was not a final order. For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken.[13] Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), an order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.[14] Workers' compensation proceedings are special proceedings for purposes of appellate review.[15]

The question, then, is whether the December 3, 2012, order directing the vocational rehabilitation counselor to prepare a loss of earning capacity and vocational rehabilitation evaluation affected Reinke's substantial rights. The answer is that it did not. The order specifically stated that the court was making no determination as to Deleon's ultimate entitlement to either of those benefits. If and when an award of such benefits is made to Deleon after the hearing on his petition to modify the 2010 award, Reinke's substantial rights may be affected and it can file an appeal at that time. We therefore do not address the merits of Reinke's argument with respect to this order.

2. Merits of Appeal From Enforcement Order

Reinke argues that the compensation court erred in finding it was obligated to pay additional temporary total disability benefits to Deleon. It contends it paid all benefits due until Deleon reached maximum medical improvement for his physical injuries and that it cannot be obligated to pay Deleon for indemnity benefits related to his psychiatric condition because "no medical evidence whatsoever exists stating that Deleon is

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[13] *Selma Development v. Great Western Bank*, 285 Neb. 37, 825 N.W.2d 215 (2013); *In re Estate of McKillip*, 284 Neb. 367, 820 N.W.2d 868 (2012).

[14] *Pinnacle Enters. v. City of Papillion*, 286 Neb. 322, 836 N.W.2d 588 (2013); *Selma Development v. Great Western Bank*, *supra* note 13.

[15] See *Becerra v. United Parcel Service*, *supra* note 7.

unable to secure and maintain gainful employment as a result of his . . . psychiatric condition."[16] Reinke further contends that because no additional temporary total disability benefits were due Deleon, the compensation court erred in awarding a waiting-time penalty and attorney fees.

We disagree. As the compensation court noted, the only issue before it was Deleon's claim that Reinke was not complying with the terms of the 2010 award. And that award very clearly states that Deleon was entitled to receive temporary total disability benefits until he reached maximum medical improvement for both his physical injuries and his psychiatric injury. Reinke's argument that the evidence presented in 2010 does not support an award of compensation for Deleon's psychiatric injury is not properly made at this time; such an argument should have been made at trial prior to the entry of the 2010 award and on appeal from that award. Based on the plain language of the 2010 award and the parties' stipulation, the compensation court properly found that Deleon was entitled to receive temporary total disability benefits until August 30, 2012, the date of maximum medical improvement for all his injuries. And because the language of the award was very clear, there was no reasonable controversy as to Deleon's entitlement to the benefits and the compensation court properly imposed a waiting-time penalty and awarded attorney fees.

V. CONCLUSION

We lack jurisdiction over the appeal from the order directing the vocational rehabilitation counselor to perform an evaluation and therefore dismiss the appeal with respect to that order. The order of the compensation court enforcing the 2010 award is affirmed in all respects.

AFFIRMED IN PART, AND IN PART DISMISSED.

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[16] Brief for appellant at 13-14.

VILLAGE OF MEMPHIS, NEBRASKA, A POLITICAL SUBDIVISION, APPELLEE, V. ROGER FRAHM AND MARCIA FRAHM, HUSBAND AND WIFE, APPELLANTS.

843 N.W.2d 608

Filed February 14, 2014. No. S-13-273.

1. **Contracts.** The construction of a contract is a question of law.
2. **Statutes.** Statutory interpretation presents a question of law.
3. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
4. **Attorney Fees: Appeal and Error.** On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion.
5. **Contracts.** A settlement agreement is subject to the general principles of contract law.
6. **Contracts: Statutes: Attorney Fees.** In accordance with the legal maxim "expressio unius est exclusio alterius" (the expression of one thing is the exclusion of the others), an express reservation in a settlement agreement of a claim for attorney fees under one specific statute excludes a claim for attorney fees under any other statute.
7. **Courts: Eminent Domain.** The powers conferred upon a county court judge by the condemnation statutes are not judicial powers or duties, but are instead purely ministerial in character.
8. **Eminent Domain: Damages: Proof.** In a condemnation action, the public entity has the burden to allege and prove that before commencing condemnation proceedings, a good faith attempt was made to agree with the owner of the land as to the damages the owner was entitled to receive.
9. **Eminent Domain.** The requirement of good faith negotiations is in the nature of a condition precedent to the right to condemn.
10. **Eminent Domain: Words and Phrases.** Inverse condemnation is a shorthand description for a landowner suit to recover just compensation for a governmental taking of the landowner's property without the benefit of condemnation proceedings.
11. **Eminent Domain: Property: Intent.** Inverse condemnation has been characterized as an action or eminent domain proceeding initiated by the property owner rather than the public entity, and has been deemed to be available where private property has actually been taken for public use without formal condemnation proceedings and where it appears that there is no intention or willingness of the taker to bring such proceedings.
12. **Eminent Domain: Attorney Fees: Appeal and Error.** Neb. Rev. Stat. § 76-720 (Reissue 2009) does not permit an award of attorney fees for services rendered prior to the initiation of an appeal in district court.
13. **Courts: Eminent Domain: Time: Appeal and Error.** Because a public entity does not have the right to condemn without a good faith attempt to negotiate, it follows that if an appeal is taken to the district court in a condemnation action,

for purposes of Neb. Rev. Stat. § 76-720 (Reissue 2009), the critical time period for good faith negotiations with the landowner is before the public entity initiated condemnation proceedings.

14. **Eminent Domain.** There is no requirement of good faith negotiations before a landowner commences an inverse condemnation action.
15. **Eminent Domain: Time: Appeal and Error.** If an appeal is taken to the district court in an inverse condemnation action, the relevant time period for any good faith negotiations for purposes of Neb. Rev. Stat. § 76-720 (Reissue 2009) is after the filing of the appeal.
16. **Eminent Domain: Statutes: Intent: Appeal and Error.** The purpose of Neb. Rev. Stat. § 76-720 (Reissue 2009) is to protect property owners against harassment by the institution of groundless appeals on the part of public entities, and its use should be limited to the purposes for which it was intended.
17. **Eminent Domain: Attorney Fees.** Under Neb. Rev. Stat. § 76-720 (Reissue 2009), the district court shall award the property owner attorney fees if the court finds that the public entity did not negotiate in good faith with the property owner.

Appeal from the District Court for Saunders County: MARY C. GILBRIDE, Judge. Affirmed.

Robert M. Sullivan, of Sullivan Shoemaker, P.C., L.L.O., for appellants.

Damien J. Wright, of Welch Law Firm, P.C., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

CASSEL, J.

INTRODUCTION

If a public entity initiates condemnation proceedings without negotiating in good faith with the property owner, a statute mandates that the owner be allowed attorney fees upon an appeal to the district court.[1] In this appeal, we must determine how this statute applies where the property owner initiates an inverse condemnation proceeding with a county judge and the public entity appeals to the district court. We conclude that in such a situation, good faith negotiations after the taking of the appeal satisfy the statutory requirement. And because the record demonstrates that the public entity did so, we conclude

[1] See Neb. Rev. Stat. § 76-720 (Reissue 2009).

that the district court did not abuse its discretion in declining to award attorney fees.

BACKGROUND

In 1974, a church executed an "Easement for Right of Way" that granted to the Village of Memphis, Nebraska (Village), the right to construct and operate a water distribution line and wellhouse on a strip of land owned by the church. At some point, the Village had underground electrical wires installed on the real property in order to connect the equipment to a power supply. However, the electrical wires were partly situated under a portion of the real property that was outside of the easement area.

In 2008, Roger Frahm and Marcia Frahm purchased the church's property. The Frahms observed the wellhouse, but their efforts to obtain a copy of the easement for it were unsuccessful. The easement was not recorded in the records of the register of deeds for Saunders County, Nebraska, until April 3, 2009. Sometime after the Frahms purchased the property, they discovered that one of the Village's underground utility lines associated with the operation of the wellhouse had been placed outside of the easement area.

In October 2009, the Frahms filed with the county judge an inverse condemnation petition against the Village and sought compensation for an alleged unlawful taking. They claimed that the Village deprived them of their property in violation of the state and federal Constitutions by (1) maintaining a well, wellhouse, and related improvements upon the Frahms' property without an easement and (2) maintaining a buried powerline and water pipes without an easement. The appraisers appointed by the county judge found that the Frahms suffered damages by the Village's burying electric cable and a water line outside of the easement area and by the Village's failure to record an easement in the office of the Saunders County register of deeds. The appraisers assessed the damages to be awarded to the Frahms at $15,000. The Frahms subsequently moved for attorney fees and expenses under Neb. Rev. Stat. § 76-726(2) (Reissue 2009), and the county judge ordered the Village to pay $5,322 to the Frahms.

The Village appealed to the district court from the return of the appraisers and requested that the court determine the Village had a valid and existing easement. The Village subsequently moved for summary judgment, alleging that there was no genuine issue of material fact with regard to the validity of its easement rights upon the Frahms' property. Following a hearing, the district court entered partial summary judgment. The court stated that there was no issue of fact that the presence of the wellhouse was apparent, that the Frahms conducted an inquiry into the facts and learned of the easement prior to the purchase, and that they purchased the land subject to the easement for the wellhouse and the underground lines which serve the wellhouse. The court determined that the Frahms were not entitled to compensation as the result of inverse condemnation with respect to the easement, but that there was an issue as to whether they were entitled to compensation for the portion of the lines which was outside of the easement area.

After the Village filed its appeal to the district court, there were numerous communications between the parties in an attempt to negotiate a settlement. The parties ultimately signed a settlement agreement and release. According to a recital in the agreement, the parties intended to "fully and forever settl[e] the issue of compensation to be paid to the Frahms for the alleged taking on the terms set forth in this Settlement Agreement, and to submit the issue of the Frahms' claim for attorney's fees to the Court for determination." Under the agreement, the Village would pay the Frahms $250 and upon receipt of that payment, the Frahms would execute a utility license to grant the Village a license for the operation, use, and maintenance of the Village's utility line. The Village agreed to abandon the powerline that was outside of the easement area and to install a new line within the easement area. The agreement contained the following release:

> 4. **Release.** Upon receipt of the Settlement Payment in full, the Frahms irrevocably and unconditionally waive, release, acquit and forever discharge the Village . . . from any and all claims, demands, obligations, losses, causes of action, costs, expenses, and liabilities that in any way

> arise from or relate to the taking alleged in their inverse condemnation suit, whether such claims are based on contract, tort, statutory or other legal or equitable theory of recovery, whether known or unknown, that the Frahms may have against the Village for acts occurring prior to the execution of this Settlement Agreement; **Except** that the Frahms reserve a claim for attorney's fees as allowed by . . . § 76-720.

The parties subsequently filed a stipulation with the district court which stated that the parties had entered into a settlement agreement as to compensation to be paid to the Frahms for the taking alleged in their inverse condemnation action and that the Frahms "preserved a claim for attorney's fees pursuant to . . . § 76-720."

The Frahms subsequently moved for fees and costs, seeking a total of $25,362.15 in attorney fees. During a hearing on the motion, the district court received evidence of the parties' numerous attempts to reach a settlement. The court denied the motion, stating: "The record reflects that the Village negotiated an easement with the prior owners of the property. . . . The record does not demonstrate that the Village failed to engage in good faith negotiations with respect to that small portion of the utility line placed outside the easement." The court concluded that under the terms of the settlement agreement, the Frahms waived their right to attorney fees under § 76-726 and that attorney fees were not available on the facts of this case under § 76-720.

The Frahms timely appealed, and we moved the case to our docket under our statutory authority to regulate the caseloads of the appellate courts of this state.[2]

ASSIGNMENTS OF ERROR

The Frahms allege that the district court erred in (1) failing to find that the Village abandoned the easement by failing to timely file it and by failing to timely produce a copy of it upon the Frahms' request, (2) finding that the Frahms were not bona fide purchasers without notice of the easement on

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[2] See Neb. Rev. Stat. § 24-1106 (Reissue 2008).

the property, (3) finding that the Frahms learned of the easement prior to their purchase of the property, (4) finding that the Frahms purchased the property subject to the easement, (5) finding that the property was servient to the easement when it was purchased by the Frahms, (6) finding that the Frahms were not entitled to compensation for the easement, (7) denying the Frahms' motion for attorney fees and costs, and (8) finding that the Frahms waived recovery of attorney fees under § 76-726(2).

STANDARD OF REVIEW

[1-3] The construction of a contract is a question of law.[3] Statutory interpretation presents a question of law.[4] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.[5]

[4] On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion.[6]

ANALYSIS

Waiver of Claims

The Frahms' first six assignments of error relate to the district court's order granting the Village partial summary judgment. Generally, the Frahms attack the court's rulings related to their knowledge of the easement at the time of purchase, the easement's continued validity, and whether the Frahms were entitled to monetary damages due to the easement. They contend that the court should not have entered partial summary judgment because genuine issues of material fact existed.

[5] The Frahms' arguments ignore the terms of the settlement agreement. A settlement agreement is subject to the general principles of contract law.[7] In the settlement agreement,

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[3] *Thrower v. Anson*, 276 Neb. 102, 752 N.W.2d 555 (2008).

[4] *Id.*

[5] *Id.*

[6] *Armstrong v. County of Dixon*, 282 Neb. 623, 808 N.W.2d 37 (2011).

[7] *Id.*

the Frahms "acknowledge[d]" that the easement was "binding upon them" and they specifically waived and released all claims that "in any way arise from or relate to the taking alleged in their inverse condemnation suit." Their inverse condemnation petition alleged two unlawful takings: (1) the maintenance of the well, wellhouse, and related improvements without an easement and (2) the maintenance of the buried powerline and water pipes without an easement. Under the clear and unambiguous language of the release, the Frahms have waived any claims concerning the easement and the court's entry of partial summary judgment.

[6] The Frahms also assign that the district court erred in finding that they waived recovery of attorney fees under § 76-726(2). Their argument acknowledges the release contained in the settlement agreement but claims that the release did not waive recovery of fees under § 76-726 because the general language of the release did not mention attorney fees. We disagree. The release explicitly waived "all claims . . . that in any way arise from or relate to the taking alleged in their inverse condemnation suit . . . **Except** that the Frahms reserve a claim for attorney's fees as allowed by . . . § 76-720." In accordance with the legal maxim "expressio unius est exclusio alterius" (the expression of one thing is the exclusion of the others),[8] the express reservation in the settlement agreement of a claim for attorney fees under one specific statute excludes a claim for attorney fees under any other statute. Because the release specifically reserved a claim for attorney fees under § 76-720 but did not reserve a claim for attorney fees under § 76-726, we conclude such a claim is waived under the plain language of the settlement agreement.

Attorney Fees Under § 76-720

Because of the waiver of all other claims, the only assignment of error properly before us is the Frahms' contention that the district court erred in finding attorney fees were not available to them under § 76-720. Section 76-720 provides in part:

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[8] *Poulton v. State Farm Fire & Cas. Cos.*, 267 Neb. 569, 675 N.W.2d 665 (2004).

> If an appeal is taken from the award of the appraisers by the [property owner] and the amount of the final judgment is greater by fifteen percent than the amount of the award, or if appeal is taken by the [public entity] and the amount of the final judgment is not less than eighty-five percent of the award, or if appeal is taken by both parties and the final judgment is greater in any amount than the award, the court may in its discretion award to the [property owner] a reasonable sum for the fees of his or her attorney and for fees necessarily incurred for not more than two expert witnesses. On any appeal by the [public entity], the [public entity] shall pay all court costs on appeal. If appeal is taken by the [property owner] only and the final judgment is not equal to or greater than the award of the appraisers, the court may in its discretion award to the [public entity] the court costs incurred by the [public entity], but not attorney or expert witness fees.
>
> If an appeal is taken to the district court and the district court finds that the [public entity] did not negotiate in good faith with the property owner or there was no public purpose for taking the property involved, the court shall award to the [property owner] a reasonable sum for the fees of his or her attorney and the [public entity] shall pay all court costs on appeal.

The parties focus on the second paragraph of the statute, as did the district court. There does not appear to be any dispute that the taking was for a public purpose; rather, the dispute centers on whether the Village engaged in good faith negotiations.

The parties disagree on when the good faith negotiations need to have occurred in the context of § 76-720 as applied in an inverse condemnation proceeding initiated by the Frahms before a county judge and appealed by the Village to the district court. The Frahms assert that the lack of good faith negotiations is inherent in inverse condemnation cases and that the Village needed to initiate good faith negotiations prior to the filing of the petition in inverse condemnation. The Village, on

the other hand, points out that § 76-720 relates only to appeals and asserts that the Frahms' interpretation is inconsistent with the language of the statute. Before deciding this question, we must briefly summarize the nature of condemnation proceedings at the county court level and the distinctions between condemnation and inverse condemnation actions.

[7] The powers conferred upon a county court judge by the condemnation statutes are not judicial powers or duties, but are instead purely ministerial in character.[9] Instead of conducting a trial and receiving evidence, the county judge appoints the appraisers.[10] The hearing is before the appraisers rather than the court, and the issues in county court are limited to the amount of damages.[11] Thus, we have determined that whether a public entity had attempted to negotiate a sale prior to commencing condemnation proceedings was a judicial question which the county court lacked power to decide.[12] The appeal to the district court taken under Neb. Rev. Stat. § 76-715 (Reissue 2009) is part of the proceedings which are initiated by the property owner in county court by filing under Neb. Rev. Stat. § 76-705 (Reissue 2009).[13] The appeal authorized by § 76-715 is not a conventional civil appeal from county court to district court.[14] Under § 76-715, the property owner or public entity appeals from the assessment of damages by the appraisers rather than from an order or ruling of the county court.[15] And unlike a conventional appeal, the appeal is tried de novo in the district court.[16]

[8-11] A condemnation action is distinct from an inverse condemnation action. "A condemnation proceeding is 'the

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[9] *City of Waverly v. Hedrick*, 283 Neb. 464, 810 N.W.2d 706 (2012).

[10] See *id.*

[11] See *id.*

[12] See *Higgins v. Loup River Public Power Dist.*, 157 Neb. 652, 61 N.W.2d 213 (1953).

[13] *Armstrong v. County of Dixon*, *supra* note 6.

[14] *Id.*

[15] See *id.*

[16] See *id.*

exercise of eminent domain by a governmental entity.'"[17] In a condemnation action, the public entity has the burden to allege and prove that before commencing condemnation proceedings, a good faith attempt was made to agree with the owner of the land as to the damages the owner was entitled to receive.[18] The requirement of good faith negotiations is in the nature of a condition precedent to the right to condemn.[19] There is no similar requirement of good faith negotiations in an inverse condemnation action. Inverse condemnation is a shorthand description for a landowner suit to recover just compensation for a governmental taking of the landowner's property without the benefit of condemnation proceedings.[20] Inverse condemnation has been characterized as an action or eminent domain proceeding initiated by the property owner rather than the public entity, and has been deemed to be available where private property has actually been taken for public use without formal condemnation proceedings and where it appears that there is no intention or willingness of the taker to bring such proceedings.[21]

[12] Other statutes make it clear that attorney fees in inverse condemnation proceedings initiated by the owner at the county court level are not included in § 76-720. A statute specifically allows the owner of property taken or damaged for public use without condemnation proceedings to file a petition with the county judge to have the damages ascertained and determined.[22] Another statute expressly requires that the property owner be awarded costs, including reasonable attorney fees, where the owner receives an award of damages or a settlement is effected at the county court level.[23] And under this statute,

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[17] *Pinnacle Enters. v. City of Papillion*, 286 Neb. 322, 332-33, 836 N.W.2d 588, 596 (2013).

[18] See *Moody's Inc. v. State*, 201 Neb. 271, 267 N.W.2d 192 (1978).

[19] *Id.*

[20] *Henderson v. City of Columbus*, 285 Neb. 482, 827 N.W.2d 486 (2013).

[21] *Id.*

[22] See § 76-705.

[23] See § 76-726(2).

the owner is entitled to the award of attorney fees regardless of whether there have been good faith negotiations. Thus, the attorney fees attributable to a proceeding commenced by the owner with the county judge are not included under § 76-720 but are governed by another statute. It necessarily follows that attorney fees in such a proceeding authorized by § 76-720 apply only at the district court level. Indeed, we have held that § 76-720 does not permit an award of attorney fees for services rendered prior to the initiation of an appeal in district court.[24]

[13-15] Nothing in the language of § 76-720 indicates that it does not apply to inverse condemnation actions. Thus, we must interpret § 76-720 in such a manner that it applies to both condemnation and inverse condemnation actions. Because a public entity does not have the right to condemn without a good faith attempt to negotiate,[25] it follows that if an appeal is taken to the district court in a condemnation action, for purposes of § 76-720, the critical time period for good faith negotiations with the landowner is before the public entity initiated condemnation proceedings. On the other hand, there is no requirement of good faith negotiations before a landowner commences an inverse condemnation action. And, as we have already noted, another statute mandates an award of attorney fees for the proceedings at the county court level. Thus, we conclude that if an appeal is taken to the district court in an inverse condemnation action, the relevant time period for any good faith negotiations for purposes of § 76-720 is after the filing of the appeal. We reject the Frahms' argument that the good faith negotiations must occur before the filing of an inverse condemnation action.

[16] As the Village points out,

> [o]nce the appraisers return their award, the parties must consider whether to appeal to the District Court for a de novo proceeding. In this context, § 76-720 is intended to promote the efficient resolution of disputes by providing

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[24] *Johnson v. Nebraska Public Power Dist.*, 187 Neb. 421, 191 N.W.2d 594 (1971).

[25] See *Moody's Inc. v. State*, *supra* note 18.

> for attorney's fees through two mechanisms: the 85/15 percent threshold, and the "good faith" requirement. These mechanisms provide an incentive for the parties to either accept the appraisers return if they do not believe that it will be substantially altered by trial on the merits, or to negotiate a settlement to the matter. Thus, the statute contemplates that "good faith" negotiations will occur as part of the appeal process.[26]

The purpose of § 76-720 is to protect property owners against harassment by the institution of groundless appeals on the part of public entities, and its use should be limited to the purposes for which it was intended.[27]

[17] Under § 76-720, the district court shall award the property owner attorney fees if the court finds that the public entity did not negotiate in good faith with the property owner. Here, the district court declined to award fees, stating that the record did not demonstrate that the Village failed to engage in good faith negotiations. Based on the evidence contained in the record—which was just a sampling of the numerous communications between the parties aimed at settling this case after the appeal to the district court was filed—we conclude that the district court did not abuse its discretion in declining to award attorney fees.

CONCLUSION

We conclude that under the clear and unambiguous language of the release contained in the parties' settlement agreement, the Frahms waived all claims concerning the easement, the court's entry of partial summary judgment, and attorney fees under § 76-726. We further conclude that the district court did not abuse its discretion in declining to award attorney fees under § 76-720, because the record demonstrated that the Village engaged in good faith negotiations to settle with the Frahms after the Village appealed to the district court.

AFFIRMED.

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[26] Brief for appellee at 22-23.

[27] *Anderson v. State*, 184 Neb. 467, 168 N.W.2d 522 (1969).

ODILON VISOSO, ALSO KNOWN AS ADAM RODRIGUEZ, APPELLANT, V. CARGILL MEAT SOLUTIONS, APPELLEE.

843 N.W.2d 597

Filed February 14, 2014. No. S-13-454.

1. **Workers' Compensation: Appeal and Error.** A judgment, order, or award of the Workers' Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact, the evidence must be considered in the light most favorable to the successful party, every controverted fact must be resolved in favor of the successful party, and the successful party will have the benefit of every inference that is reasonably deducible from the evidence.

Appeal from the Workers' Compensation Court: DANIEL R. FRIDRICH, Judge. Reversed and remanded.

Ryan C. Holsten and Leslie S. Stryker, Senior Certified Law Student, of Atwood, Holsten, Brown & Deaver Law Firm, P.C., L.L.O., for appellant.

Caroline M. Westerhold and Jenny L. Panko, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

HEAVICAN, C.J.

INTRODUCTION

In a prior appeal, Odilon Visoso appealed the decision of the Nebraska Workers' Compensation Court's finding that he had failed to meet his burden of proving loss of earning capacity in his new community in Mexico and declining his claim for permanent impairment. We remanded the cause to permit Visoso to establish loss of earning capacity using the Schuyler, Nebraska, community where the injury occurred. On remand, the compensation court reviewed the previously

submitted earning capacity reports and found Visoso suffered a 45-percent loss of earning capacity. Visoso appeals. We reverse, and remand.

BACKGROUND

Visoso, also known as Adam Rodriguez, began working for Cargill Meat Solutions (Cargill) in Schuyler in March 2006. On May 9, Visoso was injured when a quarter slab of beef fell from a conveyor belt hook onto Visoso's head. Visoso's initial medical treatment included physical therapy, chiropractic services, pain medication, and steroid injections. Visoso eventually required surgery on his neck in October 2007, but continued to experience pain. After a trial in 2008, Visoso was awarded temporary total disability benefits. The Nebraska Court of Appeals affirmed the award.[1]

In 2011, Cargill petitioned to discontinue the temporary disability benefits because Visoso had reached maximum medical improvement. Vocational rehabilitation counselor Karen Stricklett was appointed to provide a report on Visoso's loss of earning capacity. While the modification action was pending, Visoso returned to Mexico.

Stricklett prepared a preliminary report of Visoso's loss of earning capacity based on the Schuyler area. In a followup report, Stricklett sought assistance in performing labor market research in the Chilpancingo, Guerrero, Mexico, area. The compensation court determined that the Chilpancingo area was the appropriate hub, but denied the request to compel Cargill to pay for market research because it found no reliable, relevant statistical information existed regarding that area.

Around this time, Visoso retained another vocational rehabilitation expert, Helen Long. Long provided a report concluding that Visoso had sustained a 100-percent loss of earning capacity, regardless of his location. After Long's report was submitted, Stricklett submitted a final report in which she maintained that she was unable to provide an analysis with a reasonable degree of certainty for the Chilpancingo area.

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[1] See *Visoso v. Cargill Meat Solutions*, 18 Neb. App. 202, 778 N.W.2d 504 (2009).

The parties stipulated that Visoso had reached maximum medical improvement, so the compensation court terminated Cargill's obligation to pay benefits for temporary disability. However, the compensation court found Visoso had failed to meet his burden of proving loss of earning capacity in his new community in Mexico and therefore declined Visoso's claim for permanent impairment and loss of earning capacity. Visoso appealed. This court held:

> When no credible data exists for the community to which the employee has relocated, the community where the injury occurred can serve as the hub community. Therefore, we remand the cause to the Workers' Compensation Court to allow Visoso to attempt to establish permanent impairment and loss of earning capacity using Schuyler as the hub community.[2]

On remand, a single judge of the compensation court reviewed the existing earning capacity reports and found Stricklett's earning capacity report was correct and had not been rebutted. The compensation court thus concluded Visoso had suffered a 45-percent loss of earning capacity. Visoso appeals this determination.

ASSIGNMENTS OF ERROR

Visoso assigns, reordered, that the compensation court erred in (1) finding that the opinions of Stricklett were never rebutted and (2) failing to allow the parties to present new evidence regarding loss of earning capacity based on the Schuyler hub community.

STANDARD OF REVIEW

[1] A judgment, order, or award of the Workers' Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order,

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[2] *Visoso v. Cargill Meat Solutions*, 285 Neb. 272, 290, 826 N.W.2d 845, 860 (2013).

judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.[3]

ANALYSIS

Rebuttal Evidence

In his first assignment of error, Visoso claims the compensation court erred in finding that the opinions of Stricklett were not rebutted.

Under Neb. Rev. Stat. § 48-162.01(3) (Reissue 2010),

> [a]ny loss-of-earning-power evaluation performed by a vocational rehabilitation counselor shall be performed by a counselor from the directory established pursuant to subsection (2) of this section and chosen or selected according to the procedures described in this subsection. It is a rebuttable presumption that any opinion expressed as the result of such a loss-of-earning-power evaluation is correct.

In its order, the compensation court stated that it had reviewed the reports of Stricklett and Long. However, it does not appear from the order that the judge reviewed any other part of the record. The order notes that the court found Stricklett's report to be more persuasive. The order also states that "Long never attacked any points made by . . . Stricklett or pointed out any errors in . . . Stricklett's methods or conclusions. Given that . . . Long wrote her report before . . . Stricklett's ultimate conclusions were published, it's easy to see why."

Visoso argues there was evidence in the record rebutting the opinions of Stricklett. Specifically, he points to the deposition and trial testimony of Long.

Long's deposition and trial testimony were produced after Stricklett's final report and include comments by Long regarding what she perceived as faults in Stricklett's report. Thus, it appears there was at least some evidence in the record which was relevant but not considered on remand. Where, as here, the compensation court failed to weigh all of the evidence in making its factual findings, we are unable to determine on

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[3] *Sellers v. Reefer Systems*, 283 Neb. 760, 811 N.W.2d 293 (2012).

review whether the findings of fact by the compensation court supported the order.

Our holding is consistent with the approach taken by other jurisdictions presented with this issue. In *American Mut. &c. Ins. Co. v. Williams*,[4] the Georgia Court of Appeals noted that "[w]henever the courts feel that in making findings of fact the [State Board of Workmen's Compensation] has failed to weigh all the evidence, the practice has been to recommit the case to the board for further consideration."[5] We therefore remand this cause so that the compensation court may make a finding as to whether Stricklett's report was rebutted after considering all of the evidence in the record.

Sufficiency of Evidence in Record

In Visoso's second assignment of error, he asserts the compensation court erred in not allowing the parties to present new evidence of loss of earning capacity based on the Schuyler hub community. Visoso argues that the evidence previously submitted was not fully developed because the compensation court had determined the appropriate hub to be Chilpancingo and, because the evidence was not fully developed, that there was not sufficient evidence in the record to warrant the making of the order. Since we are remanding this cause under Visoso's first assignment of error, we now consider his second assignment of error to determine whether the parties should be allowed to present additional evidence on remand.

[2] This court has stated that among the limited grounds upon which an order of the compensation court may be modified, reversed, or set aside is that there is not sufficient competent evidence in the record to warrant the making of the order.[6]

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[4] *American Mut. &c. Ins. Co. v. Williams*, 133 Ga. App. 257, 259, 211 S.E.2d 193, 195 (1974).

[5] Cf., *Miller v. Lauridsen Foods, Inc.*, 525 N.W.2d 417 (Iowa 1994); *Swift & Co. v. Industrial Com.*, 150 Ill. App. 3d 216, 501 N.E.2d 752, 103 Ill. Dec. 435 (1986).

[6] *Sellers*, *supra* note 3.

> In testing the sufficiency of the evidence to support the findings of fact, the evidence must be considered in the light most favorable to the successful party, every controverted fact must be resolved in favor of the successful party, and the successful party will have the benefit of every inference that is reasonably deducible from the evidence.[7]

Although the compensation court determined that Visoso's new community was the appropriate hub to determine loss of earning capacity, evidence was also received into the record regarding loss of earning capacity based on the Schuyler area, including reports, depositions, and testimony. At the hearing on the application for modification, Cargill objected on relevance to all questions related to loss of earning power in the Schuyler area, but the compensation court overruled the objections and allowed the evidence. The reports submitted by both vocational rehabilitation experts contain analyses and conclusions for both Schuyler and Visoso's new community in Mexico and do not in any way indicate that they are incomplete as to the Schuyler area. Visoso has failed to identify what additional information was needed and not previously submitted into evidence.

Contrary to the argument made by Visoso, the record in this case suggests that the evidence received regarding the Schuyler area was complete. We find that the evidence was sufficient to warrant an order by the compensation court and that no additional evidence is needed on remand.

CONCLUSION

We reverse the decision of the compensation court and remand the cause for further reconsideration.

REVERSED AND REMANDED.

CASSEL, J., not participating.

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[7] *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 244-45, 639 N.W.2d 125, 134 (2002).

In re Application of Mark R. O'Siochain for Admission to the Nebraska State Bar.

842 N.W.2d 763

Filed February 14, 2014. No. S-13-539.

1. **Rules of the Supreme Court: Attorneys at Law: Appeal and Error.** The Nebraska Supreme Court will consider the appeal of an applicant from a final adverse ruling of the Nebraska State Bar Commission de novo on the record made at the hearing before the commission.
2. **Rules of the Supreme Court: Attorneys at Law.** The Nebraska Supreme Court is vested with the sole power to admit persons to the practice of law in this state and to fix qualifications for admission to the Nebraska bar.
3. **Rules of the Supreme Court: Attorneys at Law: Waiver: Proof: Appeal and Error.** After the denial of an application and a hearing before the Nebraska State Bar Commission, the Nebraska Supreme Court will consider a waiver of Neb. Ct. R. § 3-105(A)(1)(b) to allow a graduate of a foreign law school based on English common law to become licensed to practice law in Nebraska if the applicant has demonstrated that the education he or she received was functionally equivalent to that for a juris doctor degree available at a law school approved by the American Bar Association.
4. **Rules of the Supreme Court: Attorneys at Law: Waiver: Proof.** When a foreign-educated attorney seeks a waiver of Neb. Ct. R. § 3-105(A)(1)(b), the burden is on the applicant to affirmatively show that the education he or she received was functionally equivalent to that of a law school approved by the American Bar Association.
5. **Rules of the Supreme Court: Attorneys at Law: Waiver: Evidence.** In determining whether an applicant's education is functionally equivalent to that received at a law school approved by the American Bar Association, the core courses set forth in *In re Application of Brown*, 270 Neb. 891, 708 N.W.2d 251 (2006), are evidence of equivalency but not bright-line requirements.
6. **Rules of the Supreme Court: Attorneys at Law.** Admission rules are intended to weed out unqualified applicants, not to prevent qualified applicants from taking the bar.
7. ____: ____. The Nebraska Supreme Court will not apply a strict application of Neb. Ct. R. § 3-105(C) if, in doing so, § 3-105(C) would operate in such a manner as to deny admission to a qualified graduate of a foreign law school arbitrarily and for a reason unrelated to the essential purpose of the rule.

Original action. Application granted.

Robert C. Guinan for applicant.

Jon Bruning, Attorney General, and Stephanie Caldwell for Nebraska State Bar Commission.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

PER CURIAM.

NATURE OF CASE

Mark R. O'Siochain filed an application with the Nebraska State Bar Commission (Commission) for admission without examination as a Class I-A applicant. We must decide whether we will grant a waiver of the educational requirement contained in Neb. Ct. R. § 3-105(A)(1)(b) and admit a graduate of a foreign law school that is not approved by the American Bar Association (ABA). Since O'Siochain filed his application, § 3-105(A)(1)(b) has been significantly revised, along with the other rules for admission of attorneys in Nebraska. See Neb. Ct. R. § 3-101 et seq. (rev. 2013). We apply the rules in effect at the time of his application.

Upon our de novo review and applying our jurisprudence regarding § 3-105(A)(1)(b), we conclude that even though O'Siochain has not taken certain core courses, he has met his burden of affirmatively showing that he "had attained educational qualifications at least equal to those required at the time of application for admission by examination to the bar of Nebraska." Accordingly, we waive the educational requirement under § 3-105(A)(1)(b) and grant O'Siochain's application for admission to the Nebraska bar.

FACTS

O'Siochain graduated from University College Dublin (UCD) in Ireland in 2004 with a bachelor of business and legal studies degree. He enrolled at UCD after graduating from high school, as is customary in Ireland, and completed a 4-year law and business program. UCD is an English-speaking, common-law school. It is not accredited by the ABA. O'Siochain did not take (and was not required to take) courses in trusts and estates, family law, or civil procedure.

UCD operates an international exchange program with 13 other law schools, including 5 ABA-approved U.S. law schools: DePaul University College of Law; University of California, Davis, School of Law; University of Connecticut

School of Law; University of Miami School of Law; and University of Minnesota Law School. Students at these ABA-approved law schools can enroll at UCD for a semester or other period of study. If they complete their courses with the necessary passing grade, the ABA permits the award of credits to their ABA-approved juris doctor degree for the legal courses taken at UCD.

Upon graduating from UCD in 2004, O'Siochain took a "Barbri" course in Ireland to prepare for the New York bar examination in February 2005. Barbri is a franchise that offers bar examination preparation courses and includes video lectures and course materials corresponding with the relevant state bar examination. O'Siochain took Barbri courses in New York practice, professional responsibility, trusts and estates, federal jurisdiction and procedure, and domestic relations, among others.

The New York State Board of Law Examiners allowed O'Siochain to sit for the New York bar examination because his legal education satisfied the durational and substantive equivalency requirements contained in the Rules of the Court of Appeals of the State of New York. O'Siochain passed the New York bar examination and the Multistate Professional Responsibility Examination (MPRE), on which he scored 104. The minimum score required in Nebraska is 85. See Neb. Ct. R. § 3-116(A). He was admitted to the New York bar in March 2006 and has been a member in good standing since that time.

From November 2006 to May 2009, O'Siochain practiced in New York with a large firm. There, he worked on transactional matters including corporate securities and mergers. At the time of the Commission hearing, O'Siochain was employed as a corporate attorney with a law firm in Omaha, Nebraska, handling corporate transactions, compliance, and mergers. He worked under the supervision of partners in the law firm and had held the position since July 2011.

On July 26, 2012, O'Siochain applied for admission to the Nebraska bar as a Class I-A applicant pursuant to § 3-105(A)(1), requesting admission without examination. Section 3-105(A)(1)(b) references and incorporates the

educational qualifications "required at the time of application for admission by examination to the bar of Nebraska." The educational qualifications for admission by examination are found at § 3-105(C). On October 16, the Commission voted to deny O'Siochain's application for admission, because O'Siochain could not meet the educational requirements of § 3-105(C), in that he did not have a first professional degree from an ABA-approved law school.

Pursuant to Neb. Ct. R. § 3-110, O'Siochain requested a hearing before the Commission to demonstrate functional equivalence between his education and experience and the education obtained at an ABA-approved law school. At the hearing on January 11, 2013, O'Siochain presented the following evidence: (1) that UCD is an English-speaking, common-law school; (2) that it operates an exchange program with ABA-approved law schools; (3) that he took a Barbri preparation course and passed the New York bar examination and MPRE; (4) that he was admitted to the New York bar and continues to maintain active status and good standing; and (5) that he has professional experience in the practice of U.S. law.

At the close of the hearing, the Commission asked O'Siochain to supplement the record with UCD's accreditation status, official descriptions of the courses he had taken there, letters of recommendation from his professors, and affidavits from law school officials describing the education offered at UCD. The Commission requested this information pursuant to the language in *In re Application of Brown*, 270 Neb. 891, 708 N.W.2d 251 (2006). O'Siochain provided the first two items of information, but he did not provide letters of recommendation from his professors or affidavits from law school officials.

In addition, O'Siochain provided evidence of New York's bar admission requirements, which the New York State Board of Law Examiners determined O'Siochain had satisfied. Those rules require a foreign-educated applicant to show (1) that he or she fulfilled the educational requirements for admission to the practice of law in such foreign country; (2) that throughout the period of the applicant's study at the foreign law school, that school was approved by the government or an authorized

accrediting body; (3) that the course of study successfully completed by the applicant was substantially equivalent in duration to the legal education provided by an ABA-approved school; (4) that the foreign country's jurisprudence is based on the principles of English common law; and (5) that the course of study successfully completed by the applicant was the substantial equivalent of the legal education provided by an ABA-approved law school.

On May 24, 2013, the Commission again denied O'Siochain's application for admission to the Nebraska bar as a Class I-A applicant under § 3-105(A)(1)(b), because he did not meet the required educational qualifications. Specifically, he had not taken certain core courses deemed minimally necessary to be a properly trained attorney, including trusts and estates, family law, and civil procedure, as set forth in *In re Application of Budman*, 272 Neb. 829, 724 N.W.2d 819 (2006); *In re Application of Brown*, *supra*; and *In re Appeal of Dundee*, 249 Neb. 807, 545 N.W.2d 756 (1996). Accordingly, the Commission declined to recommend that this court waive the educational qualifications requirement of § 3-105(C).

On June 6, 2013, O'Siochain filed a "Motion for Reconsideration," and the Commission heard additional evidence. O'Siochain argued that the core courses listed in *In re Application of Budman*, *supra*, and *In re Appeal of Dundee*, *supra*, were not required to meet the functional equivalency test, but were only examples. He offered evidence that trusts and estates and family law are not required for graduation from the University of Nebraska College of Law but that the University of Nebraska College of Law did require civil procedure. O'Siochain offered copies of the Barbri course materials he used relating to trusts and estates, family law, and civil procedure.

On June 19, 2013, the Commission overruled O'Siochain's "Motion for Reconsideration." O'Siochain appeals.

ASSIGNMENT OF ERROR

O'Siochain assigns, summarized and restated, that the Commission erred in failing to recommend a waiver of § 3-105(C) to this court on the basis that his legal education

did not include courses in trusts and estates, family law, and civil procedure.

STANDARD OF REVIEW

[1] The Nebraska Supreme Court will consider the appeal of an applicant from a final adverse ruling of the Commission de novo on the record made at the hearing before the Commission. *In re Application of Brown*, 270 Neb. 891, 708 N.W.2d 251 (2006).

ANALYSIS

[2] The Nebraska Supreme Court is vested with the sole power to admit persons to the practice of law in this state and to fix qualifications for admission to the Nebraska bar. *Id*. See, also, Neb. Const. art. II, § 1, and art. V, §§ 1 and 25. O'Siochain applied for admission to the Nebraska bar without examination as a Class I-A applicant pursuant to § 3-105(A), which provided as follows:

> (1) Class I-A applicants who may be admitted to practice in Nebraska upon approval of a proper application are those:
>
> (a) who, as determined by the [C]ommission, have been admitted to, and are active and in good standing in, the bar of another state, territory, or district of the United States, and
>
> (b) who at the time of their admission had attained educational qualifications at least equal to those required at the time of application for admission by examination to the bar of Nebraska, and
>
> (c) who have passed an examination equivalent to the examination administered in the State of Nebraska, and, beginning in 1991, who have passed the [MPRE] with the score required by Nebraska.

The parties do not dispute that O'Siochain has been admitted to and is active and in good standing in the bar of New York, satisfying § 3-105(A)(1)(a).

Section 3-105(A)(1)(c) requires an applicant to pass the MPRE, and Nebraska requires a score of 85 or higher on the MPRE. See § 3-116(A). O'Siochain took the MPRE in

applying for the New York bar and attained a score of 104, exceeding Nebraska's requirements.

Section 3-105(A)(1)(b) does not explicitly state the education requirement. Instead, § 3-105(A)(1)(b) references and incorporates the educational qualifications "required at the time of application for admission by examination to the bar of Nebraska," which are found at § 3-105(C). Section 3-105(C) requires that applicants "must have received at the time of the examination their first professional degree from a law school approved by the [ABA]."

Applicants like O'Siochain, "seeking admission without examination as a Class I-A applicant[,] must meet the ABA-approved law school requirement specified in [§ 3-105(C)] that we have read into [§ 3-105(A)(1)(b)] or, in the absence of such degree, seek a waiver of [§ 3-105(A)(1)(b)]." *In re Application of Budman*, 272 Neb. 829, 834, 724 N.W.2d 819, 824 (2006). In determining whether to grant a waiver, we examine our jurisprudence relative to educational qualification waivers that we have granted previously. See, e.g., *In re Application of Budman, supra*; *In re Application of Brown*, 270 Neb. 891, 708 N.W.2d 251 (2006).

O'Siochain earned his law degree from UCD in Ireland, a school that is not ABA-approved. Therefore, O'Siochain's degree does not satisfy the educational requirement of § 3-105(A)(1)(b), and we must determine whether to waive this requirement. On appeal, O'Siochain argues that when considered as a whole, his education and experience merit waiver of the educational requirements in § 3-105.

[3,4] After the denial of an application and a hearing before the Commission, this court will consider a waiver of § 3-105(A)(1)(b) to allow a graduate of a foreign law school based on English common law to become licensed to practice law in Nebraska if the applicant has demonstrated that the education he or she received was functionally equivalent to that for a juris doctor degree available at an ABA-approved law school. See *In re Application of Brown, supra*. When a foreign-educated attorney seeks a waiver, the burden is on the applicant to affirmatively show that the education he or she received

was functionally equivalent to that of an ABA-approved law school. See *id.*

The Commission specifically found, inter alia, that the education O'Siochain received was functionally equivalent to the education provided at an ABA-approved law school. But the Commission found that O'Siochain had not completed core courses in trusts and estates, family law, and civil procedure, which the Commission deemed minimally necessary to be a properly trained attorney under *In re Application of Budman, supra*; *In re Application of Brown, supra*; and *In re Appeal of Dundee*, 249 Neb. 807, 545 N.W.2d 756 (1996). Therefore, it did not make a recommendation to this court on whether O'Siochain had "affirmatively shown that his education, considered as a whole, is functionally equivalent to the education provided at schools approved by the [ABA]."

The Commission now claims that O'Siochain failed to adduce sufficient evidence of equivalence between his legal education and that provided at an ABA-approved law school, because he did not provide letters of recommendation from UCD professors and affidavits from law school officials describing the education offered at UCD. However, even without such documents, the Commission concluded that O'Siochain's legal education was functionally equivalent to that received at an ABA-approved law school, and our jurisprudence does not require these documents. See *In re Application of Brown, supra.*

The Commission acknowledges that the list of courses in *In re Appeal of Dundee, supra*, is not a checklist that an applicant must satisfy to sustain his or her burden. However, it interprets our jurisprudence to require that applicants missing one or more core courses must have professional experience in areas corresponding to classes he or she lacks. It contends that O'Siochain failed to meet these criteria.

[5] In *In re Application of Brown*, 270 Neb. 891, 900-01, 708 N.W.2d 251, 259 (2006), we elucidated the criteria for receiving a waiver:

> When requesting a waiver, the applicant must "show that the education received at any particular school was functionally equivalent to the education provided at

> ABA-approved schools." . . . Our waiver cases indicate that foreign-educated applicants provided extensive information regarding their academic background, including, among other aspects, the accreditation status of their law school, transcripts, official course descriptions, letters of recommendation from professors, and affidavits from law school officials describing the education offered at their schools.
>
> . . . .
>
> Although we have refused to make a bright-line determination regarding the legal courses required as prerequisites to a waiver, . . . we have recognized certain legal courses as examples of basic, core courses deemed "'minimally necessary to be a properly-trained attorney'" . . . . These courses include civil procedure, contracts, constitutional law, criminal law, evidence, family law, torts, professional responsibility, property, and trusts and estates. The Commission should not construe this listing of courses as a "checklist," but it should consider whether an applicant's education includes exposure to a range of foundational substantive areas of law.

(Citations omitted.) Thus, in determining whether an applicant's education is functionally equivalent to that received at an ABA-approved law school, the core courses are evidence of equivalency but not bright-line requirements.

In *In re Application of Brown, supra*, the applicant graduated from a Canadian law school which was not approved by the ABA, but we determined that the applicant's education as a whole was functionally equivalent to an education received at an ABA-approved law school and granted a waiver. In that case, the applicant had successfully completed courses in all but two of the subjects enumerated in *In re Appeal of Dundee*, 249 Neb. 807, 545 N.W.2d 756 (1996): professional responsibility and trusts and estates. However, one phase of the applicant's bar admissions process in Canada included instruction and an examination on professional responsibility and practice management, and the applicant had taken and passed the MPRE. The applicant had also spent time in an estate-planning practice group.

In *In re Application of Budman*, 272 Neb. 829, 724 N.W.2d 819 (2006), the Canadian-educated applicant had successfully completed courses in all but two of the core courses: trusts and estates and professional responsibility. However, in obtaining his LL.M., the applicant completed coursework in trusts and estates, and he had practiced in that area. He had passed the Colorado bar examination and was admitted to the Colorado bar, with which he remained in good standing. Subsequently, he practiced law in Colorado for approximately 8 years, specializing in estate planning and taxation. In light of these facts, we determined that the applicant's education as a whole was functionally equivalent to an education received at an ABA-approved law school and granted a waiver.

O'Siochain did not take law school courses in trusts and estates, family law, and civil procedure at UCD. O'Siochain presented evidence that although civil procedure is required for graduation from the University of Nebraska College of Law, trusts and estates and family law are not. Thus, civil procedure is the only course required by the University of Nebraska College of Law that O'Siochain has not completed. We find this to be particularly significant.

[6,7] As illustrated above, our jurisprudence expressly states and demonstrates that the core courses we listed in *In re Appeal of Dundee*, *supra*, are not to be construed as a "checklist." Rather, we ought to consider "whether an applicant's education includes exposure to a range of foundational substantive areas of law." See *In re Application of Brown*, 270 Neb. 891, 901, 708 N.W.2d 251, 259 (2006). Admission rules are "intended to weed out unqualified applicants," not "to prevent qualified applicants from taking the bar." *In re Application of Collins-Bazant*, 254 Neb. 614, 621, 578 N.W.2d 38, 43 (1998). This court will not apply a strict application of § 3-105(C) if, in doing so, § 3-105(C) would "'"operate in such a manner as to deny admission to a [qualified graduate of a foreign law school] arbitrarily and for a reason unrelated to the essential purpose of the rule."'" *In re Application of Collins-Bazant*, 254 Neb. at 621, 578 N.W.2d at 43.

O'Siochain studied U.S. law in preparation for the New York bar examination, and his studies included trusts and estates,

family law, and civil procedure. O'Siochain was deemed qualified to sit for the New York bar examination, having shown, inter alia, that the course of study he successfully completed was the substantial equivalent of the legal education provided by an ABA-approved law school. He was tested by the New York bar examination in all fundamental areas of U.S. law, including trusts and estates, family law, and civil procedure. He passed the New York bar examination and is a licensed attorney in good standing with the New York bar.

When O'Siochain's education is combined with his work experience as an attorney, efforts to become acquainted with U.S. law, passing of the New York bar examination, and admission to the New York bar, a waiver is appropriate. Upon a de novo review of the facts of this case, we conclude that O'Siochain is a qualified applicant for waiver.

CONCLUSION

Based on a de novo review, we conclude that O'Siochain has met his burden of proving his law school education and experience were functionally equivalent to the education received at an ABA-approved law school and that as a result, a waiver of the educational qualifications requirement of § 3-105(A)(1)(b) is appropriate. We waive this requirement as it applies to O'Siochain and will allow him to be admitted to the Nebraska bar.

APPLICATION GRANTED.

STATE OF NEBRASKA, APPELLEE, V.
JUNEAL DALE PRATT, APPELLANT.
842 N.W.2d 800

Filed February 21, 2014. No. S-11-760.

1. **DNA Testing: Appeal and Error.** A motion for DNA testing is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
2. ____: ____. In an appeal from a proceeding under the DNA Testing Act, the trial court's finding of fact will be upheld unless such findings are clearly erroneous.

3. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
4. **DNA Testing: Evidence.** After a proper motion seeking forensic DNA testing has been filed, the State is required by Neb. Rev. Stat. § 29-4120(4) (Reissue 2008) to file an inventory of all evidence that was secured by the State or a political subdivision in connection with the case.
5. **Evidence: Proof.** The burden to produce evidence will rest upon the party who does not have the general burden of proof if that party possesses positive and complete knowledge concerning the existence of facts which the party having that burden is called upon to negative, or if the evidence to prove a fact is chiefly within the party's control.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and MOORE and RIEDMANN, Judges, on appeal thereto from the District Court for Douglas County, W. RUSSELL BOWIE III, Judge. Judgment of Court of Appeals affirmed.

Tracy L. Hightower-Henne, of Hightower Reff Law, L.L.C., for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

Amy A. Miller for amicus curiae American Civil Liberties Union Foundation of Nebraska.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

NATURE OF CASE

Under the DNA Testing Act, an inmate seeks retesting of DNA evidence relating to his 1975 convictions of robbery, rape, and sodomy. Previous DNA testing in 2005 revealed that at least one stain of biological material was from a male who was not the defendant. However, the testing conducted in 2005 could not distinguish between semen and epithelial cells in older materials. Furthermore, there was evidence that the materials had been handled by numerous parties and that the amount of DNA found on the materials could have come from such handling. Therefore, the DNA test results were neither

exonerating nor exculpatory and the district court denied the inmate's motion to vacate his convictions or grant a new trial, based on the 2005 test results. The inmate's current motion for DNA testing alleges that new, more accurate testing techniques may lead to exonerating or exculpatory evidence. In particular, an expert affidavit establishes that current testing technology can distinguish between semen and epithelial cells on the materials in question. The district court denied the motion for retesting. The Nebraska Court of Appeals reversed. For reasons different from those stated by the Court of Appeals, we affirm its determination that the district court erred in denying Pratt's motion for retesting under the Act.

BACKGROUND

Trial and Convictions

In 1975, Juneal Dale Pratt was convicted of sodomy, forcible rape, and two counts of robbery. The evidence at trial showed that two sisters had been forced into their hotel room, where they were robbed and sexually assaulted by a single male perpetrator. The perpetrator ripped the sisters' shirts down the front, apparently in an attempt to find hidden money. He forced them to remove the rest of their clothes. The perpetrator proceeded to make one sister perform oral sex on him, while the other sister's face was covered with an article of clothing. The perpetrator did not ejaculate during oral sex. The perpetrator then raped the other sister, while the first sister's face was covered with an article of clothing. Sperm cells were found on that sister's vaginal walls. She testified at trial that she was wearing her torn shirt at the time of the rape. Both sisters testified that the perpetrator repeatedly rummaged through their belongings looking for more money and other items of value. He then left them tied up and alone in the hotel room.

The State presented evidence that Pratt had robbed another victim at the same hotel approximately a week after the robberies and assaults of the sisters. Pratt was apprehended after a chase that followed this second robbery. The sisters had independently identified Pratt as the perpetrator in both a three-man lineup and a voice lineup. In addition, the sisters recognized

the shoes worn by Pratt as the shoes worn by the perpetrator and they identified a ring worn by Pratt as a ring stolen during the robberies and assaults.

Pratt testified in his own defense at trial. He presented an alibi, which was confirmed by his live-in girlfriend. Pratt's sister testified that the ring in question belonged to her. A shoe-store owner testified that the type of shoes Pratt was wearing was not uncommon.

The jury found Pratt guilty of all crimes charged. He was sentenced to consecutive prison terms of 5 to 10 years on the sodomy count, 7 to 20 years on the rape count, and 10 to 30 years on each robbery count. His convictions and sentences were affirmed on direct appeal.[1]

2004 Motion for DNA Testing

In 2004, Pratt moved for testing under the DNA Testing Act (hereinafter the Act).[2] Pursuant to the requirements of the Act, the State filed an inventory of all evidence that was secured in connection with Pratt's case.[3] The inventory revealed that the State had retained the two ripped shirts, a bra, and the clothing worn by Pratt the day he was apprehended. The State had not retained the semen samples obtained from the rape victim. The sisters' underwear had likewise been either lost or destroyed.

All the retained clothing was stored together in a small cardboard box. Each item had an exhibit sticker on it.

The district court granted Pratt's 2004 request to conduct DNA testing. The State did not appeal from the 2004 order granting testing under the Act.

No apparent stains were found on the bra. Several stained areas containing potential biological materials were identified on the torn shirts, however, and were tested in 2005 at the University of Nebraska Medical Center (UNMC). Pratt provided a buccal swab for comparison to any DNA found. Pratt's clothes were not tested.

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[1] *State v. Pratt*, 197 Neb. 382, 249 N.W.2d 495 (1977).

[2] See Neb. Rev. Stat. §§ 29-4116 to 29-4125 (Reissue 2008).

[3] § 29-4120(4).

The presumptive testing conducted in 2005 to identify whether any DNA found was from semen cells or epithelial cells targeted an enzyme that was not stable. Thus, given the age of the biological material on the shirts, the DNA testing conducted could not distinguish whether any DNA identified on the shirts came from semen cells or epithelial cells.

Most of the 2005 DNA test results were inconclusive as to Pratt. But one stain on the rape victim's shirt showed that while it may or may not have been a mixture of one or more individuals, if it was not a mixture, then Pratt would be excluded. Another area of that same shirt showed a mixture of more than one individual's DNA. At least one of the contributors to that mixture was male. The DNA testing excluded Pratt as that male.

Given the amplification methods available in 2005, and without the DNA profiles of the victims to help sort out mixtures, UNMC was unable to isolate and identify any full DNA profile.

2007 Motion to Vacate/New Trial After 2005 Test Results

Based on the presence of an unidentified male's DNA on the rape victim's shirt, in 2007, Pratt filed a motion under § 29-4123 to vacate and set aside his conviction or, in the alternative, for new trial.

The technologist who conducted the DNA testing testified at the hearing on Pratt's 2007 motion. The technologist testified that it was her practice to try to cut out as small a sample as possible in order to leave some of the biological stain for subsequent testing that she or anyone else would need to do. She testified that the remaining stained pieces of fabric from the victims' shirts should have been returned to the State's custody with the rest of the evidence.

The technologist testified that storing several items together in a cardboard box was not an appropriate way to store items to avoid cross-contamination. She did not, however, connect this possibility of cross-contamination to her interpretation of the results of the DNA testing.

The technologist testified that by merely touching clothing, a person could deposit sufficient DNA in epithelial cells to result in a partial profile, given the amplification techniques available in 2005. The technologist conceded that if the shirts were handled by male police officers, clerks, and jurors, then any of those persons could have deposited the male DNA she detected. She testified that it was impossible to know how or when the DNA she detected was deposited on the victims' shirts.

On February 28, 2008, the district court denied Pratt's motion to vacate or for new trial. Apparently based on the technologist's testimony, the court concluded that "[n]either of the shirts [was] handled or stored in a way likely to safeguard the integrity of any biological matter which may have been deposited on them at the time of the attacks . . . ." The court explained that the shirts must have been touched when the exhibit stickers were placed on them and that the shirts, because they bore exhibit stickers, must have been available for the jurors to inspect. The court noted that several jurors, the prosecutor, the defense lawyers, and the court reporters were male. The district court noted that at the time of the trial, there was no awareness that simply handling the shirts could "contaminate" them for future scientific testing. The court concluded that since there was no evidence of semen on the shirts and simply handling the shirts could have deposited DNA material sufficient for a partial profile, the results neither exonerated nor exculpated Pratt.

On appeal from that 2008 order, we affirmed the denial of the motion to vacate or for new trial.[4] We reiterated the reasoning of the district court, including that "the evidence was not stored in such a way as to preserve the integrity of any DNA evidence."[5] We explained, as the district court did, that the DNA cells of another male found on the clothing could have come from extraneous epithelial cells deposited from simply handling the clothing.

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[4] *State v. Pratt*, 277 Neb. 887, 766 N.W.2d 111 (2009).

[5] *Id.* at 895, 766 N.W.2d at 117.

2011 Motion for DNA Retesting

In 2011, Pratt filed a second motion for DNA testing of the biological evidence pertinent to his conviction. Pratt alleged that testing techniques now available at certain accredited laboratories can distinguish semen cells from epithelial cells—even when those cells are approximately 30 years old. Furthermore, new testing procedures could potentially extract the victims' DNA from the armpit or collar of the victims' shirts and remove those profiles from the mixed samples, leading to the identification of full profiles from the DNA present. Finally, Pratt alleged generally that more powerful amplification techniques could render a complete profile of the male DNA on the shirts. Pratt expected to be excluded as a contributor of the DNA on the shirts, and he expected to be able to search DNA databases to find the true perpetrator of the crimes. He alleged that none of the requested testing was available in 2005.

Pratt attached to his motion the affidavit of Brian Wraxall, chief forensic serologist of the Serological Research Institute in California. That affidavit was entered into evidence at the hearing on the motion for testing.

Wraxall stated that he had reviewed the 2005 DNA analysis of the biological materials found on the shirts. Wraxall opined that "the analysis of the items of evidence submitted to UNMC is by far incomplete due to the limitations of the testing done at UNMC and to the improvements in technology that have occurred since 2005." Wraxall explained that the testing used in 2005 targeted a semen-specific enzyme that was not stable and tended to degrade over time. Wraxall instead proposed that a "P30" test be utilized, which targets a semen protein that "is very stable." Wraxall explained that finding spermatozoa in 30-year-old cases was "very possible."

Wraxall further averred that "[w]e now have techniques that were not available in 2005 but can be used to increase our ability to obtain full profiles in small, old and degraded samples." Wraxall stated that although it would be ideal to obtain DNA samples from the victims, it "was and is possible" to attempt to extract the victims' DNA from certain areas of

the shirts, and thereby isolate the male DNA profile from the mixed stains. Wraxall explained that "[i]f the clothing is not washed (e.g. hats) DNA from perspiration and abrasions can build up on the item where it is in contact with the body." He would attempt to extract the victims' DNA from those areas. Wraxall opined that any risk due to commingling of the clothing was "minimal."

The district court denied the motion for retesting of the shirts. The court found that the first prong of § 29-4120(5) was met—that the DNA testing requested was not available at the time of his trial.

But the court found that the second prong of § 29-4120(5) was not met. The court reasoned that it had "already determined that the materials to be tested were not maintained under circumstances likely to safeguard the integrity of their original composition, and the Supreme Court affirmed that finding." In addition, the court explained, "[i]t is quite possible that the clothing has further deteriorated or been further handled in a manner to deposit still more unidentified DNA."

The court alternatively found that the third prong of § 29-4120(5) was not met—that the requested testing would not provide noncumulative exculpatory evidence. In support of that finding, the court outlined the evidence against Pratt at his original trial. The court said that any test results would create "only another circumstance on which Pratt cou[ld] argue reasonable doubt."

Pratt appealed the denial of his motion for DNA testing to the Court of Appeals. The State did not cross-appeal.

Appeal

Pratt argued on appeal that the lower court was bound by law of the case, res judicata, or collateral estoppel and could not redetermine its finding in 2004 that the biological material was retained under circumstances likely to safeguard the integrity of its original physical composition. He apparently did not make those issue-preclusion arguments to the district court. Pratt also asserted that the shirts have been retained in the custody of either the State or UNMC since the first tests were conducted and that the court erred in finding prong two

was not met. Finally, Pratt argued that the district court erred in finding that new DNA tests could not lead to exculpatory evidence.

In its reply brief, the State argued that the district court's decision was correct because none of the three prongs of § 29-4120(5) had been satisfied.

The State argued that the first prong was not met, because Wraxall's affidavit did not *explicitly* state that the testing now requested was not available at the time the first request was granted.

The State argued that the second prong of § 29-4120(5) was not met, because Pratt presented no evidence on the issue of whether the evidence had been retained under circumstances likely to safeguard the integrity of their original composition. In particular, the State refused to concede that, since 2005, it had retained the evidence in its custody and in a manner mandated by the Act.[6]

The State argued that the third prong of § 29-4120(5) was not met, because DNA testing would not necessarily provide any conclusive result as to the source of the male DNA, as alleged in Pratt's motion. Like the district court, the State cited to the strength of the State's original case against Pratt.

The Court of Appeals reversed the decision of the district court. The Court of Appeals rejected Pratt's various arguments for issue preclusion. But it held that the lower court abused its discretion when it denied Pratt's second motion for DNA testing, concluding that the three prongs of § 29-4120(5) had been met.[7] We granted the State's petition for further review.

ASSIGNMENTS OF ERROR

The State assigns that the Court of Appeals erred by (1) finding that biological material had been retained under circumstances likely to safeguard the integrity of its original physical composition based upon a review of the evidence since the previous motion for DNA testing; (2) concluding that

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[6] See § 29-4125.

[7] *State v. Pratt*, 20 Neb. App. 434, 824 N.W.2d 393 (2013).

DNA testing may produce noncumulative, exculpatory evidence; and (3) ordering successive DNA testing.

STANDARD OF REVIEW

[1] A motion for DNA testing is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.[8]

[2] In an appeal from a proceeding under the Act, the trial court's finding of fact will be upheld unless such findings are clearly erroneous.[9]

[3] When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.[10]

ANALYSIS

The Act

The Act, passed in 2001, was intended to allow wrongfully convicted persons the opportunity to establish their innocence through DNA, or deoxyribonucleic acid, testing, which was not widely available before 1994.[11] In addition, the Legislature declared that

> new forensic DNA testing procedures . . . make it possible to obtain results from minute samples that previously could not be tested and to obtain more informative and accurate results than earlier forms of forensic DNA testing could produce. As a result, in some cases, convicted inmates have been exonerated by new DNA tests after earlier tests had failed to produce definitive results.[12]

The Legislature declared in § 29-4118(4) that "DNA testing is often feasible on relevant biological material that is decades old." "DNA evidence produced even decades after a

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[8] *State v. Leon*, 279 Neb. 734, 781 N.W.2d 608 (2010).

[9] See *State v. Haas*, 279 Neb. 812, 782 N.W.2d 584 (2010).

[10] See *State v. Morgan*, 286 Neb. 556, 837 N.W.2d 543 (2013).

[11] §§ 29-4117 and 29-4118.

[12] § 29-4118(3).

conviction can provide a more reliable basis for establishing a correct verdict than any evidence proffered at the original trial."[13] "DNA testing," the Legislature explained, "responds to serious concerns regarding wrongful convictions, especially those arising out of mistaken eyewitness identification testimony."[14]

A person in custody takes the first step toward obtaining possible relief under the Act by filing a motion requesting forensic DNA testing of biological material. We have described DNA testing as being "available"[15] under § 29-4120(1) for any biological material that (1) is related to the investigation or prosecution that resulted in the judgment, (2) is in the actual or constructive possession of the State or others likely to safeguard the integrity of the biological material, and (3) either was not previously subjected to DNA testing or can be retested with more accurate current techniques.

[4] After a proper motion seeking forensic DNA testing has been filed, the State is required by § 29-4120(4) to file an inventory of all evidence that was secured by the State or a political subdivision in connection with the case. Then, upon consideration of affidavits or after a hearing, pursuant to § 29-4120(5), the court "shall" order testing upon a determination (1) that such testing was effectively not available at the time of trial, (2) that the biological material has been retained under circumstances likely to safeguard the integrity of its original physical composition, and (3) that such testing may produce noncumulative, exculpatory evidence relevant to the claim that the person was wrongfully convicted or sentenced.

Once the court orders testing, if the test results "exonerate or exculpate"[16] the person, then either party may request a hearing before the district court. Following such hearing, the district court may, on its own motion or upon the motion of

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[13] § 29-4118(4).

[14] § 29-4118(6).

[15] See, e.g., *State v. Phelps*, 273 Neb. 36, 40, 727 N.W.2d 224, 227 (2007).

[16] § 29-4123(2).

any party, vacate and set aside the judgment.[17] Alternatively, any party may file a motion for new trial under Neb. Rev. Stat. §§ 29-2101 to 29-2103 (Reissue 2008).[18] The extraordinary remedy of vacating the judgment is available for the compelling circumstance in which actual innocence is conclusively established by DNA testing.[19] In contrast, an ordinary remedy of a new trial is provided for circumstances in which newly discovered DNA evidence would have, if available at the former trial, probably produced a substantially different result.[20]

The order before us is the district court's denial of Pratt's motion for retesting. A possible motion to vacate or for new trial based on the results of such testing is not yet at issue. As will be explained further below, we conclude that the Act mandates Pratt be given the opportunity to retest the biological materials pertinent to his convictions. Pratt was convicted before the advent of DNA testing, and the evidence against him consisted of eyewitness testimony and other circumstantial evidence. He presented uncontroverted evidence that the biological evidence can now be retested with more accurate current techniques which may exclude Pratt as the contributor of possible semen on the shirts and identify the true perpetrator. We conclude that the three prongs of § 29-4120(5) were met.

Testing Effectively Not Available

The district court found in favor of Pratt under prong one of § 29-4120(5), that the testing he requested was effectively not available at the time of trial. The Court of Appeals addressed the merits of this prong, affirming the district court's finding with additional requirements, which the Court of Appeals concluded Pratt had met as a matter of law. The State did not cross-appeal the district court's finding on prong one. To the

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[17] *Id.*

[18] § 29-4123(3).

[19] See *State v. Buckman*, 267 Neb. 505, 675 N.W.2d 372 (2004).

[20] *Id.*

extent that the State properly assigns as error the Court of Appeals' conclusion as to prong one, that issue was waived by the State's failure to cross-appeal.

Proceedings under the Act are civil in nature.[21] Although the State has only a limited right to appeal in a criminal case, there are no such restrictions under the Act. Thus, as in any other civil proceeding, the State must cross-appeal in order for this court to consider any argument that a lower court's decision should be upheld on grounds specifically rejected below.[22]

Physical Integrity

The court determined that prong two of § 29-4120(5), that "the biological material has been retained under circumstances likely to safeguard the integrity of its original physical composition," was not demonstrated. Because the uncontroverted evidence presented at the hearing was to the contrary, the district court clearly erred in this determination.

The State argues that Pratt failed to sustain his burden to prove that the biological evidence tested in 2005 still exists and has been maintained since 2005 in a way likely to safeguard its "integrity." While we would agree that total destruction of the evidence would mean its physical "integrity" was not safeguarded, we disagree with the State that Pratt had the burden to provide evidence over which the State, not Pratt, has particular knowledge and control.

[5] The general burden of proof is usually upon the party seeking affirmative relief.[23] Nevertheless, it is an equally fundamental proposition that the burden to produce evidence will rest upon the party who does not have the general burden of proof if that party possesses positive and complete knowledge concerning the existence of facts which the party having that burden is called upon to negative, or if the evidence to prove a fact is chiefly within the party's control.[24]

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[21] See, e.g., *State v. Pratt*, 273 Neb. 817, 733 N.W.2d 868 (2007).

[22] See *Weber v. Gas 'N Shop*, 278 Neb. 49, 767 N.W.2d 746 (2009).

[23] See, e.g., *State v. Malcom*, 12 Neb. App. 432, 675 N.W.2d 728 (2004).

[24] See *State ex rel. Wagner v. Amwest Surety Ins. Co.*, 274 Neb. 121, 738 N.W.2d 813 (2007).

Since 2001, § 29-4125 mandates that the State shall "preserve" any biological material secured in connection with a criminal case for such period of time as any person remains incarcerated in connection with that case. The biological evidence tested in 2005 was in the State's custody from the time it was collected as evidence of the crimes. It was given to UNMC for testing. UNMC is a State entity and was employed by the State to conduct testing. Furthermore, the technologist testified that, after testing, the remaining stained pieces of fabric from the victims' shirts should have been returned to the State's custody with the rest of the evidence.

Other courts reason that it is only logical that the state, as the custodian of the evidence, has the burden to establish whether the requested biological evidence still exists and is available for testing.[25] We agree. It cannot be the inmate's burden to demonstrate how the evidence was retained by the State while that evidence was in the State's custody. Facts pertaining to the State's safeguarding of the evidence while in its custody are chiefly within the State's knowledge and control.

In addition, the Act specifically requires that upon an inmate's motion for testing, the State must file an "inventory of all evidence that was secured by the state."[26] This, in essence, codifies the burden of proof to be on the State. Here, § 29-4120(4) requires that the State demonstrate that the biological evidence that existed in 2005 was not consumed in testing or otherwise destroyed. An "inventory" of things "secured" logically indicates a list of the things the State still has, not just the things once collected but not retained.

The State failed to produce an updated inventory upon Pratt's 2011 motion. Upon remand, we direct the State to file an inventory as required under § 29-4120(4). In the event that the biological evidence no longer exists, as the State argues may be the case, obviously it cannot be tested. However, Pratt is not required by the Act to somehow prove either that the evidence still exists, that it is still in the State's possession,

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[25] See, *Blake v. State*, 395 Md. 213, 909 A.2d 1020 (2006); *People v. Pitts*, 4 N.Y.3d 303, 828 N.E.2d 67, 795 N.Y.S.2d 151 (2005).

[26] § 29-4120(4).

or that it was retained properly while in the State's custody and during the time that the State had the statutory duty to preserve it.

As for the status of those biological materials before the State's statutory duty to safeguard them arose in 2001, we must address the meaning of prong two's "integrity" language. This is the first occasion we have had to do so.

It is undisputed that the shirts were stored in a cardboard box and probably handled by various persons during the course of the trial. The State believes that the possibility of extraneous DNA from epithelial cells being deposited onto the evidence during storage and handling relates to the "integrity" of the "original physical composition" of the relevant "biological material[s]."[27] The Court of Appeals, in its opinion below, accepted that assumption. We conclude that the possibility of extraneous DNA being deposited on the evidence instead relates to whether the requested DNA testing may lead to exculpatory evidence—whether any DNA found will have a bearing on the guilt or culpability of Pratt. That is prong three.

Dictionaries define "integrity" as the state of being unmarred, unimpaired, complete, undivided, whole, unified, or sound in construction.[28] The integrity at issue under § 29-4120(5) is that of the "original physical composition" of "the biological material." Since this is a DNA testing statute, the relevant "biological material[s]" are, fundamentally, the DNA. The question under the physical integrity prong thus is whether the evidence has been retained in a manner "likely" to avoid impairment of the original physical integrity of any DNA deposited during the crime or otherwise relevant to the crime.

No other state or federal DNA statute utilizes this "integrity" language. Most statutes do, however, require a finding that the evidence was subjected to a "chain of custody" sufficient

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[27] § 29-4120(5).

[28] See, Concise Oxford American Dictionary 466 (2006); Merriam Webster's Collegiate Dictionary 608 (10th ed. 1996); Webster's Third New International Dictionary of the English Language, Unabridged 1174 (1993).

to establish that it has not been "substituted, tampered with, replaced or altered in any material aspect."[29] Some statutes and cases describe this absence of substituting, tampering, replacing, or altering, as the overall "integrity" of the evidence.[30] We find that to be an apt characterization of the meaning of "integrity" in the context of DNA evidence.

In determining that prong two was not met, the district court relied exclusively on the fact that the shirts had been stored in a cardboard box together with Pratt's clothing and that they had apparently been touched by jurors, attorneys, court employees, and other employees who would have reason to be in contact with the evidence. But this incautious storage and handling indicate that extraneous DNA may have been added to the shirts, not necessarily that the integrity of the original physical composition of the relevant DNA has been somehow compromised. In fact, all the evidence before the court indicated that the "integrity" of the biological evidence was not materially affected by the storage and handling of the evidence.

Despite any mixtures with extraneous DNA or with the victims' DNA, and with knowledge of the past storage and handling of the shirts, Wraxall averred that a partial or full profile of the perpetrator's DNA could still be obtained. The State presented no expert testimony to the contrary. Despite testimony that storing clothing in a cardboard box is no longer

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[29] Cal. Penal Code § 1405(f)(2) (West 2011). Accord, Ark. Code Ann. § 16-112-202(4) (2006); D.C. Code § 22-4133(a)(2) (Supp. 2009); Idaho Code Ann. § 19-4902(c)(2) (2004); 725 Ill. Comp. Stat. Ann. § 5/116-3(b)(2) (LexisNexis Cum. Supp. 2009); Me. Rev. Stat. Ann. tit. 15, § 2138(4)(C) (West 2003); Minn. Stat. § 590.01(1a)(1)(b)(2) (2012); N.J. Stat. Ann. § 2A:84A-32a(d)(2) (West 2011); Tex. Crim. Proc. Code Ann. § 64.03(a)(1)(A)(i) and (ii) (West 2013). See, also, Del. Code Ann. tit. 11, § 4504(a)(4) (2007); Fla. Stat. Ann. § 925.11(2)(f)(2) (West Cum. Supp. 2014); Ind. Code Ann. § 35-38-7-8(2)(B) (LexisNexis Cum. Supp. 2009); Md. Code Ann., Crim. Proc. § 8-201 (LexisNexis Cum. Supp. 2009); Utah Code Ann. § 78B-9-301(2)(a) and (b) (LexisNexis 2012); Va. Code Ann. § 19.2-327.1(A)(ii) (2008).

[30] See, Miss. Code. Ann. § 99-39-9(1)(d) (Supp. 2013); S.C. Code Ann. § 17-28-70(E) (Cum. Supp. 2011); *People v. Urioste*, 316 Ill. App. 3d 307, 736 N.E.2d 706, 249 Ill. Dec. 512 (2000).

considered "appropriate," there is no evidence in the record from either this motion or the prior proceedings upon Pratt's 2007 motion to vacate or for new trial, that the perpetrator's DNA, if deposited, has since decomposed or otherwise had its physical composition marred, substituted, tampered with, replaced, or altered as a result of the inappropriate storage and handling. Thus, the district court clearly erred in its determination that the biological material has not been retained under circumstances likely to safeguard the integrity of its original physical composition.

If we were to interpret the physical integrity prong as demanding that the biological evidence was secured in a way likely to avoid accidental contamination with extraneous DNA from epithelial cells, then the express purposes of the Act would be undermined. We have no reason to believe that storing items of evidence containing biological materials in a cardboard box or allowing jurors and attorneys to handle that evidence was anything other than accepted and commonplace before the advent of DNA testing. As the district court noted in its 2008 order, there was no awareness at the time of Pratt's trial that handling the shirts could "contaminate" them for future scientific testing. Yet, the legislative findings of the Act specifically state its purpose is to test evidence originally retained during this period of ignorance of optimal retention standards for biological materials. The Act states that DNA testing is "often feasible on relevant biological material that is decades old."[31] The physical integrity prong of the Act clearly was not drafted to prevent discovery of relevant exculpatory DNA evidence simply because the evidence was not stored or handled in a manner comporting with current scientific knowledge and standards.

Finally, we note that the district court reasoned that it had "already determined that the materials to be tested were not maintained under circumstances likely to safeguard the integrity of their original composition, and the Supreme Court affirmed that finding." That is not entirely accurate. The district court utilized the language of § 29-4120(5) (for determinations

[31] § 29-4118(4).

upon which testing must be ordered) when it considered Pratt's 2007 motion to vacate or for new trial based upon the 2005 test results. But the only statutory inquiry upon a motion to vacate or for new trial under the Act is whether the DNA evidence "exonerate[s]" or "exculpate[s]" the inmate.[32] As Pratt points out, when the prong of physical integrity was squarely before the district court, i.e., when considering whether to grant Pratt's motion for DNA testing in 2005, the district court necessarily found that the biological evidence had been retained under circumstances likely to safeguard the integrity of its original physical composition.

We admittedly parroted the "integrity" language of the district court's 2008 order in our opinion affirming the denial of Pratt's motion to vacate or for new trial, which was based on the 2005 test results.[33] Our reasoning, however, was that the evidence was not exculpatory. This was also essentially the reasoning of the district court in 2008. The presence of another male's DNA on the victims' shirts did not exonerate or exculpate Pratt because the testing conducted in 2005 could not reveal if the DNA was from semen cells or epithelial cells, and the shirts had apparently been handled by several people. The technologist testified that such handling could account for the concentration of male DNA found on the shirts.

Exculpatory Evidence

The retesting Pratt now requests can distinguish between semen cells and epithelial cells. We have explained that the determination under prong three, whether the evidence "may" produce noncumulative, exculpatory evidence, is a "relatively undemanding" standard and "will generally preclude testing only where the evidence at issue would have no bearing on the guilt or culpability of the movant."[34] The Act defines "exculpatory" as "evidence which is favorable to the person

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[32] § 29-4123(2).

[33] See *State v. Pratt*, *supra* note 4.

[34] *State v. Buckman*, *supra* note 19, 267 Neb. at 515, 675 N.W.2d at 381. See, also, e.g., *State v. Lotter*, 266 Neb. 758, 669 N.W.2d 438 (2003).

in custody and material to the issue of the guilt of the person in custody."[35] The district court clearly erred in determining that test results that could identify another male's semen on the victims' clothing would have no bearing on Pratt's guilt or culpability.

In *State v. White*[36] and *State v. Winslow*,[37] we similarly held that the district court abused its discretion when it denied the inmates' request for DNA testing of the semen samples found at the scene of crimes, which included rape. We said that a possible DNA test result that excluded the defendants as contributors to the semen samples "may be exculpatory" when the State's theory was that only the defendants raped the victim.[38]

The district court's reasoning setting forth the amount of evidence against Pratt at his original trial and stating that additional DNA testing would create "only another circumstance on which Pratt cou[ld] argue reasonable doubt" reflects an improper inquiry. If DNA testing may produce evidence upon which Pratt could argue reasonable doubt about whether he was the rapist, by definition, such evidence may have a bearing upon his guilt or culpability.

We already know from the 2005 testing that at least one other male's DNA is on the victims' shirts. If, for example, that male's DNA is identified as coming from semen, then that would bear upon Pratt's guilt or culpability. Whether such evidence—if found—ultimately should be deemed exonerating or exculpatory would be determined upon a motion to vacate or for new trial and after a hearing on such motion. At that time, the court could explore the likelihood that the semen sample could have been the result of contamination during storage. The presence or absence of a full profile, as Wraxall believes it is now possible to obtain, may be relevant to that inquiry.

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[35] § 29-4119.

[36] *State v. White*, 274 Neb. 419, 740 N.W.2d 801 (2007).

[37] *State v. Winslow*, 274 Neb. 427, 740 N.W.2d 794 (2007).

[38] See, *id.*; *State v. White*, *supra* note 36.

The theory of the prosecution at Pratt's trial was that a single perpetrator committed the rape and sodomy of the two victims. The perpetrator ejaculated, and the rape victim was wearing the torn shirt during the rape. The perpetrator repeatedly rummaged through the victims' clothing. Retesting can distinguish between semen cells and epithelial cells. Indisputably, the requested retesting "may" lead to exculpatory evidence.

CONCLUSION

Pratt was convicted through eyewitness identification testimony and circumstantial evidence. The Legislature has declared that "DNA testing responds to serious concerns regarding wrongful convictions, especially those arising out of mistaken eyewitness identification testimony."[39] We affirm the judgment of the Court of Appeals to the effect that the district court abused its discretion in denying Pratt's motion to retest the biological materials on the victims' shirts. Upon remand, the State shall file an inventory indicating the continued existence and location of the biological materials in question.

AFFIRMED.

CASSEL, J., not participating.

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[39] § 29-4118(6).

HEAVICAN, C.J., dissenting.

I respectfully dissent. I cannot find that the district court clearly erred in determining that the materials to be tested were not maintained under circumstances likely to safeguard the integrity of their original composition. Thus, I would affirm the decision of the district court.

BURDEN OF PROOF

The majority concludes that the State has the burden of proving whether the material requested for testing still exists and whether it has been maintained in a way likely to safeguard its integrity as required by the second prong of Neb. Rev. Stat. § 29-4120(5) (Reissue 2008).

Other jurisdictions have clearly placed the burden of pleading and proving all elements of a statutory right to DNA testing, including chain of custody, on the petitioner.[1] Alternatively, some states require the inmate to make a prima facie showing that the chain of custody has been satisfactory and then shift the burden to the State to prove otherwise.[2] I find these approaches to be more consistent with our previous cases placing the burden of proof on the party seeking postconviction relief.[3] Even under the majority's approach, however, the evidence in this case was sufficient to prove by a preponderance of the evidence that the materials to be tested were not maintained under circumstances likely to safeguard their integrity. The district court made such a finding, and we previously agreed.[4]

PHYSICAL INTEGRITY

As the majority opinion notes, "It is undisputed that the shirts were stored in a cardboard box and probably handled by various persons during the course of the trial." Nevertheless, the majority concludes that the risk of extraneous DNA relates not to the physical integrity of the material, but, rather, to whether the requested DNA testing may lead to exculpatory evidence. This conclusion is inconsistent with *State v. Phelps*,[5] in which we held that it was not clearly erroneous for the court to determine clothing had not been safeguarded for the purposes of DNA testing where the clothing had been exposed to weather and potentially to wildlife prior to being found,

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[1] See *State ex rel. Richey v. Hill*, 216 W. Va. 155, 603 S.E.2d 177 (2004). See, also, Mo. Rev. Stat. § 547.035(6) (West 2002); N.M. Stat. Ann. § 31-1A-2(C) (Cum. Supp. 2008); Utah Code Ann. § 78B-9-301(2)(a) and (b) (LexisNexis 2012).

[2] See, e.g., Del. Code Ann. tit. 11, § 4504 (2007); 725 Ill. Comp. Stat. Ann. § 5/116-3 (LexisNexis Cum. Supp. 2009); Mont. Code Ann. § 46-21-110 (2007).

[3] See *State v. Phillips*, 186 Neb. 547, 184 N.W.2d 639 (1971).

[4] See *State v. Pratt*, 277 Neb. 887, 766 N.W.2d 111 (2009).

[5] *State v. Phelps*, 273 Neb. 36, 41, 727 N.W.2d 224, 228 (2007).

and had later been "handled by numerous persons during the investigation and at trial."

The majority opinion also notes that while statutes in other jurisdictions do not utilize the "integrity" language, most require a finding that the evidence was maintained with a proper "'chain of custody.'" The majority describes this as requiring that the evidence has not been "'substituted, tampered with, replaced or altered in any material aspect.'" However, another word found frequently in the description of proper chain of custody required by statutes of other jurisdictions is "contaminated."[6] In this case, while the physical integrity of the materials to be tested has been maintained in the sense that the shirts have not decomposed or been replaced, the shirts have been contaminated by frequent handling and storage with other evidence.

In his second motion for DNA testing, Pratt alleges that the testing techniques proposed by Brian Wraxall, the forensic serologist, are more effective at determining whether the source of the DNA is semen or epithelial cells. Under the facts of this case, I do not believe this changes the physical integrity analysis. Presumptive testing for the presence of semen has already been performed on the clothing, and the results were negative. Even if new testing revealed the presence of a previously undetected, minute amount of semen, the frequent handling by numerous individuals means we could only speculate when or how the semen was deposited on the clothing. The failure to maintain the evidence under circumstances likely to safeguard its integrity negates any assumption that extraneous DNA found on the clothing must be from the perpetrator of the crime.

For the foregoing reasons, I cannot find that the district court clearly erred, and I would affirm.

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[6] See, e.g., 18 U.S.C. § 3600(a)(4) (2012); Del. Code Ann. tit. 11, § 4504(a)(4); Mont. Code Ann. § 46-21-110(1)(b).

STATE OF NEBRASKA, APPELLEE, V. JOSHUA G. ALFREDSON, APPELLANT.

842 N.W.2d 815

Filed February 21, 2014. No. S-13-036.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent from the lower court's decision.
2. **Postconviction.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law.
3. **Effectiveness of Counsel: Appeal and Error.** A petitioner's claim that his or her defense counsel provided ineffective assistance presents a mixed question of law and fact. An appellate court reviews factual findings for clear error. Whether the defense counsel's performance was deficient and whether the petitioner was prejudiced by that performance are questions of law that the appellate court reviews independently of the lower court's decision.
4. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
5. **Postconviction: Final Orders.** Within a postconviction proceeding, an order granting an evidentiary hearing on some issues and denying a hearing on others is a final order as to the claims denied without a hearing.
6. ____: ____. An order denying an evidentiary hearing on a postconviction claim is a final judgment as to that claim.
7. **Postconviction: Time: Appeal and Error.** Under Neb. Rev. Stat. § 25-1912 (Reissue 2008), a notice of appeal must be filed on postconviction claims within 30 days.
8. **Right to Counsel: Plea Bargains.** The plea-bargaining process presents a critical stage of a criminal prosecution to which the right to counsel applies.
9. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.
10. ____: ____. To show deficient performance, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.
11. **Effectiveness of Counsel: Presumptions.** In determining whether trial counsel's performance was deficient, courts give counsel's acts a strong presumption of reasonableness.
12. **Effectiveness of Counsel: Proof.** To show prejudice, the defendant must demonstrate reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.

13. **Postconviction: Effectiveness of Counsel: Proof.** The defendant has the burden in postconviction proceedings of demonstrating ineffectiveness of counsel, and the record must affirmatively support that claim.
14. **Effectiveness of Counsel: Plea Bargains.** As a general rule, defense counsel has the duty to communicate to the defendant all formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the defendant.

Appeal from the District Court for Lancaster County: KAREN B. FLOWERS, Judge. Affirmed.

Nancy K. Peterson for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

HEAVICAN, C.J.

NATURE OF CASE

This is a postconviction appeal. Joshua G. Alfredson was convicted by a jury of first degree sexual assault and second degree false imprisonment. He was sentenced to 15 to 20 years' imprisonment for first degree sexual assault and 1 year's imprisonment for second degree false imprisonment, to be served concurrently. On direct appeal, his convictions and sentences were affirmed.[1]

Alfredson now appeals the district court's July 24, 2012, dismissal of all but one of his claims for postconviction relief without an evidentiary hearing. An evidentiary hearing was held on trial counsel's failure to disclose an alleged plea offer. Alfredson also appeals the district court's December 11 denial of his ineffective assistance of counsel claim based on those allegations. We affirm.

BACKGROUND

The facts adduced at Alfredson's trial are discussed in greater detail in *State v. Alfredson*,[2] and are limited herein

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[1] *State v. Alfredson*, 282 Neb. 476, 804 N.W.2d 153 (2011).

[2] *Id.*

to the facts pertinent to Alfredson's appealed postconviction claims. The sexual assault and false imprisonment took place in Alfredson's apartment on April 5, 2009. The victim testified that on that date, Alfredson, with whom she had previously had a sexual relationship, became increasingly angry.

The victim testified that Alfredson ingested cocaine that he kept in a prescription bottle. When the victim attempted to leave, taking the prescription bottle with her, Alfredson physically prevented her from doing so. Alfredson proceeded to sexually assault her.

After his convictions and sentences were affirmed by this court, Alfredson timely filed a motion for postconviction relief. His amended motion alleged that (1) the trial court erred, under Neb. Rev. Stat. § 27-404 (Cum. Supp. 2012), in allowing evidence of his cocaine use; (2) there was prosecutorial misconduct; (3) he received ineffective assistance of trial counsel for a variety of reasons, including failure to object at trial to the cocaine testimony and failure to properly investigate; (4) the trial court failed to properly instruct the jury; (5) there was insufficient evidence to support his convictions; (6) he received ineffective assistance of appellate counsel; and (7) trial counsel was ineffective for failing to advise him of plea negotiations.

On July 24, 2012, the district court held that the

> State's motion to deny an evidentiary hearing is overruled with respect to the allegation that Alfredson received ineffective assistance of counsel with respect to a plea offer allegedly made by the State prior to trial. The Motion to deny an evidentiary hearing is sustained as to all other allegations contain [sic] in Alfredson's Motion for Post-Conviction relief.

The district court also appointed counsel.

On November 27, 2012, an evidentiary hearing was held. Alfredson offered his own deposition testimony and the deposition testimony of trial counsel. At the hearing, the State called as witnesses trial counsel and the deputy county attorney who prosecuted the case.

In his deposition, Alfredson testified that trial counsel discussed only one plea offer with him in September 2009. This

was a formal written offer extended by the county attorney to trial counsel that would have allowed Alfredson to plead guilty to one count of attempted first degree sexual assault, a Class III felony. Alfredson rejected the offer.

Alfredson testified that after he acquired trial counsel's case file, he discovered that in mid-December 2009, a "plea offer" was made. In his deposition, Alfredson argues that he would have given consideration to this plea offer because it would have allowed him to continue his education under the "GI Bill" upon his release from incarceration.

According to trial counsel's notes, which were admitted into evidence, the alleged "plea offer" occurred on December 16, 2009. Trial counsel testified that he had an unexpected and brief meeting with the county attorney at the courthouse. According to trial counsel, the county attorney asked trial counsel whether Alfredson would be interested in two "zero to fives," with both being sex charges. The county attorney testified that he had no recollection of that conversation.

Trial counsel, a public defender since 1984, testified that he did not believe the December 16, 2009, conversation was a formal plea offer, because there was no discussion about what charges Alfredson would plead guilty to. The county attorney testified that before he can negotiate a formal plea offer, he is required to consult with the victim and his superiors, which he did not do in December 2009. The county attorney testified that therefore, he did not believe the December 16 conversation, if it occurred as recalled by trial counsel, was a formal offer for a plea deal.

Trial counsel admits that he did not communicate the alleged plea offer to Alfredson until he met with him face-to-face on December 31, 2009. Trial counsel testified that he did not recollect the December 31 meeting, but testified that his notes reflect that Alfredson was not willing to plead guilty to any felony. Trial counsel believes that this note was written because Alfredson had rejected the alleged "zero to fives" offer.

Alfredson testified that on December 31, 2009, trial counsel simply asked him whether there was any felony to which he would plead. Alfredson recalls no discussion of offenses,

punishments, sex offender registry issues, or collateral consequences.

After the evidentiary hearing, the district court, on December 11, 2012, denied Alfredson's motion for postconviction relief on the ineffective assistance of trial counsel claim for failure to disclose the plea offer. The district court noted that there was no evidence that a formal offer was made on December 16, 2009. It found that Alfredson had failed to present any evidence to show a reasonable probability that the offer would not have been canceled before the plea offer could have been accepted, because the evidence indicated that the county attorney was not authorized to make such a plea offer.

Alfredson filed his notice of appeal on January 10, 2013.

ASSIGNMENTS OF ERROR

Alfredson assigns that the district erred in (1) finding trial counsel was not ineffective for failing to communicate a plea offer and (2) dismissing without an evidentiary hearing his claims that trial counsel was ineffective for failing to properly investigate the incident and for failing to make an objection under § 27-404 to the evidence of his cocaine use and possession.

STANDARD OF REVIEW

[1,2] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent from the lower court's decision.[3] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law.[4]

[3] A petitioner's claim that his or her defense counsel provided ineffective assistance presents a mixed question of law and fact.[5] We review factual findings for clear error.[6]

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[3] *In re Interest of Violet T.*, 286 Neb. 949, 840 N.W.2d 459 (2013).

[4] *State v. Boppre*, 280 Neb. 774, 790 N.W.2d 417 (2010).

[5] *State v. Robinson*, 285 Neb. 394, 827 N.W.2d 292 (2013).

[6] *Id.*

Whether the defense counsel's performance was deficient and whether the petitioner was prejudiced by that performance are questions of law that we review independently of the lower court's decision.[7]

ANALYSIS

JURISDICTION

[4] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[8] The district court entered two separate orders denying Alfredson's postconviction claims. The first order, on July 24, 2012, denied all claims without an evidentiary hearing except for the claim relating to the alleged plea offer. The second order, entered on December 11, after the evidentiary hearing, denied the remaining claim.

[5-7] Within a postconviction proceeding, an order granting an evidentiary hearing on some issues and denying a hearing on others is a final order as to the claims denied without a hearing.[9] In other words, an order denying an evidentiary hearing on a postconviction claim is a final judgment as to that claim.[10] Under Neb. Rev. Stat. § 25-1912 (Reissue 2008), a notice of appeal must be filed on those postconviction claims within 30 days.

The order denying all but one of Alfredson's postconviction claims without an evidentiary hearing was entered on July 24, 2012. Alfredson's notice of appeal, filed on January 10, 2013, is therefore untimely with respect to that order. Alfredson's right to appeal the July 24, 2012, order is time barred. Accordingly, our jurisdiction extends only to the assignment of error relating to Alfredson's claim that his trial counsel was ineffective for failing to disclose a plea bargain, as to which the appeal is timely.

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[7] *Id.*

[8] *Carlos H. v. Lindsay M.*, 283 Neb. 1004, 815 N.W.2d 168 (2012).

[9] *State v. Timmens*, 282 Neb. 787, 805 N.W.2d 704 (2011).

[10] *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011).

Ineffective Assistance—Plea Bargain

[8] Alfredson's only surviving assignment of error regards his claim that trial counsel's failure to disclose an offered plea bargain constituted ineffective assistance. The plea-bargaining process presents a critical stage of a criminal prosecution to which the right to counsel applies.[11] As in any other ineffective assistance of counsel claim, we begin by reviewing Alfredson's allegations under the two-part framework of *Strickland v. Washington*.[12]

[9-11] To prevail on a claim of ineffective assistance of counsel under *Strickland*, the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.[13] To show deficient performance, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.[14] In determining whether trial counsel's performance was deficient, courts give counsel's acts a strong presumption of reasonableness.[15]

[12,13] To show prejudice, the defendant must demonstrate reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.[16] The defendant has the burden in postconviction proceedings of demonstrating ineffectiveness of counsel, and the record must affirmatively support that claim.[17]

Relying on federal circuit court precedent, we have previously stated that a trial counsel's failure to communicate a plea offer to a defendant is deficient performance as a matter

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[11] *State v. Iromuanya*, 282 Neb. 798, 806 N.W.2d 404 (2011).

[12] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[13] *State v. Vanderpool*, 286 Neb. 111, 835 N.W.2d 52 (2013).

[14] *Id.*

[15] *State v. Iromuanya*, *supra* note 11.

[16] *State v. Vanderpool*, *supra* note 13.

[17] *Id.*

of law.[18] This proposition of law has not been explored by our court with any detail.

Recently, the U.S. Supreme Court has clarified the issue. In *Missouri v. Frye*,[19] defense counsel failed to advise the defendant about a letter sent by the prosecutor detailing two different offers. The offers detailed the charges to which the defendant would plead, the proposed sentences, and when the offer would expire.[20] After his direct appeal had been exhausted, the defendant filed a motion for postconviction relief and the motion was denied by the Missouri Court of Appeals.

After granting certiorari, the U.S. Supreme Court held that trial counsel was deficient in failing to communicate to the defendant the prosecutor's formal written plea offer. The Supreme Court stated that, "as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused."[21] The Court stressed that negotiation tactics for plea bargaining are unique to each individual and that thus, it would not be prudent to define detailed standards for what constitutes a plea bargain offer.[22] Under the facts presented in *Frye*, the Court noted that any exceptions to the rule need not be discussed, because it was undisputed that the offer was a formal one.[23]

The Court addressed the State of Missouri's concern that such a broad rule would result in late, frivolous, and fabricated claims by stressing that it applies only to "formal offers." The opinion explains: "[T]he fact of a formal offer means that its terms and its processing can be documented so that what took place in the negotiation process becomes more clear if some later inquiry turns on the conduct of earlier

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[18] *State v. Iromuanya*, *supra* note 11.

[19] *Missouri v. Frye*, ___ U.S. ___, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012).

[20] *Id.*

[21] *Id.*, 132 S. Ct. at 1408.

[22] *Id.*

[23] *Id.*

pretrial negotiations."[24] The Court also suggests that states, in order to prevent abuse, can elect to require all offers to be in writing or require all offers be made part of the record by the prosecutor.

[14] We now hold that, as a general rule, defense counsel has the duty to communicate to the defendant all formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the defendant.

Here, the district court made a factual finding that no formal offer was made on December 16, 2009. In a postconviction case, the findings of the district court will not be disturbed unless they are clearly erroneous.[25] Our review of the record finds that the district court's factual finding that there was no formal offer is amply supported by the record.

The alleged December 16, 2009, conversation was never formalized in writing. It was made in passing, and key details such as the charges to which Alfredson would plead were not discussed. This is in direct contrast to the September plea bargain offer, which was made in writing and contained all relevant terms of the agreement.

Both trial counsel and the county attorney testified that they did not believe the discussion constituted an offer. The county attorney testified that it is a normal occurrence for him to discuss the possibility of future plea bargains with defense counsel. However, he testified that under Nebraska law, he is not allowed to offer a plea bargain without first consulting with the victim.[26] He is also required to have the plea bargain approved by his superiors before making a formal offer. Neither of the procedural requirements occurred prior to the December 16, 2009, conversation.

In sum, we conclude the district court was not clearly erroneous in its finding that there was not a formal offer made on December 16, 2009. The overwhelming weight of the evidence presented at the evidentiary hearing establishes that neither the

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[24] *Id.*, 132 S. Ct. at 1409.

[25] *State v. Robinson*, *supra* note 5.

[26] See Neb. Rev. Stat. § 29-120 (Reissue 2008).

State nor trial counsel for Alfredson believed the courthouse discussion constituted a formal offer. Without a formal offer being made, trial counsel could not have been deficient in failing to disclose it to Alfredson. Alfredson has failed to present sufficient evidence to overcome the presumption that his trial counsel acted reasonably.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

CASSEL, J., not participating.

JANE DOE, APPELLANT AND CROSS-APPELLEE, V. FIREMAN'S FUND INSURANCE COMPANY, APPELLEE AND CROSS-APPELLANT.

843 N.W.2d 639

Filed February 21, 2014. No. S-13-075.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Bankruptcy: Judgments: Appeal and Error.** Whether the automatic stay provisions of 11 U.S.C. § 362(a) (2006 & Supp. III 2009) have been violated is a question of law. An appellate court reaches a conclusion regarding questions of law independently of the trial court's conclusion.
4. **Judgments: Final Orders.** To constitute a judgment under Neb. Rev. Stat. § 25-1301 (Reissue 2008), a judge's decision must be both rendered and entered.

Appeal from the District Court for Red Willow County: DAVID URBOM, Judge. Affirmed.

Vincent M. Powers, of Vincent M. Powers & Associates, for appellant.

Patrick Q. Hustead and Christopher J. Shannon, of Hustead Law Firm, P.C., and Stephen L. Ahl and Krista M. Carlson, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

HEAVICAN, C.J.

INTRODUCTION

Under federal law, the filing of a petition in bankruptcy operates as an automatic stay of the commencement or continuation of any action or proceedings against the debtor or the recovery of a claim against the debtor which arose prior to the filing of bankruptcy.[1] This appeal asks us to determine whether the entry of a default judgment announced prior to the filing of bankruptcy, but signed and file stamped after, was stayed under federal law. We conclude that it was and, accordingly, affirm the Red Willow County District Court's order granting the motion for summary judgment of Fireman's Fund Insurance Company (Fireman's).

FACTUAL BACKGROUND

The plaintiff, Jane Doe, allegedly was sexually assaulted on August 31, 2004. The perpetrator was employed by Red Willow Dairy, L.L.C., which was owned and operated by Jim Huffman and Ann Huffman. On October 23, 2009, Doe sued Red Willow Dairy and the Huffmans in Lancaster County District Court, alleging that they failed to investigate the background of Doe's assaulter and failed to properly supervise him. Doe's amended complaint was filed on October 28. Red Willow Dairy and the Huffmans did not respond to the lawsuit in the district court, and a motion for default judgment was filed on December 14, 2009.

A hearing on the motion for default judgment was held on December 18, 2009. The judges' notes for the case were included in one of the exhibits in the instant case. The notes show that at the December 18 hearing, the court sustained the motion for default judgment and directed Doe's attorney to

[1] 11 U.S.C. § 362(a)(1) (2006 & Supp. III 2009).

submit a proposed order within 7 days. Although the subsequent signed order does not show on its face when it was signed by the court, the judges' notes show an entry on December 22, stating, "For order on default judgment see file. (default)." The signed order granting the default judgment was file stamped by the Lancaster County clerk of the district court on December 22. The day before, on December 21, Red Willow Dairy and the Huffmans had filed for chapter 7 bankruptcy.

During the bankruptcy proceedings, Doe was listed as a creditor to Red Willow Dairy and the Huffmans. Doe eventually settled her claim in return for an assignment of all rights to any and all causes of action that Red Willow Dairy and the Huffmans might have against Fireman's for its action or inaction with respect to the Lancaster County District Court lawsuit.

Doe then filed this action against Fireman's in Red Willow County District Court. Doe alleged that Fireman's had a duty to defend Red Willow Dairy and the Huffmans and had breached that duty.

Fireman's first filed a motion to dismiss, which was denied. Fireman's then filed a motion for partial summary judgment on the issue of coverage, which the district court granted, concluding that the operative insurance policy excluded claims for sexual molestation.

Doe then filed her own motion for summary judgment, and Fireman's filed two more motions—one arguing that the entry of the default judgment order violated the bankruptcy stay and another arguing that because there was no coverage under the policy, there was no duty to defend. The district court later granted summary judgment to Fireman's, reasoning that the default judgment entry violated the automatic bankruptcy stay. The district court also denied Doe's motion for summary judgment.

Doe appeals, and Fireman's cross-appeals.

ASSIGNMENTS OF ERROR

On appeal, Doe assigns that the district court erred in finding that the filing of the default judgment on December 22, 2009, violated the automatic stay of the U.S. Bankruptcy Court

and, as such, erred in granting summary judgment in favor of Fireman's.

On cross-appeal, Fireman's assigns, restated, that the district court erred in not also granting it summary judgment for the reason that because there was no coverage under the policy, Fireman's had no duty to defend.

STANDARD OF REVIEW

[1,2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.[2] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.[3]

[3] Whether the automatic stay provisions of 11 U.S.C. § 362(a) have been violated is a question of law.[4] We reach a conclusion regarding questions of law independently of the trial court's conclusion.[5]

ANALYSIS

On appeal, Doe assigns that the district court erred in concluding that the default judgment entered against Red Willow Dairy and the Huffmans violated the automatic stay of the bankruptcy court.

In this case, the district court orally pronounced the granting of default judgment in Doe's favor on Friday, December 18, 2009, as reflected by the court's minute entry. The minute entry also shows that the court directed Doe's counsel to submit a proposed order within 7 days. Red Willow Dairy

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[2] *Churchill v. Columbus Comm. Hosp.*, 285 Neb. 759, 830 N.W.2d 53 (2013).

[3] *Id.*

[4] *Eskanos & Adler, P.C. v. Leetien*, 309 F.3d 1210 (9th Cir. 2002).

[5] *Churchill v. Columbus Comm. Hosp.*, *supra* note 2.

and the Huffmans filed for bankruptcy on December 21. On Tuesday, December 22, the court made another minute entry referring to the order on default judgment. In context, it is perfectly clear that the court signed the order on December 22. And the parties agree that the order granting Doe's motion for default judgment was file stamped by the court clerk on December 22.

Doe directs this court to *In re Soares*[6] and argues that we should adopt a ministerial act exception to the bankruptcy stay. Doe argues that this court should conclude that both the rendition of the order by the judge on December 22, 2009, and the entry of the order by the court clerk, who file stamped and dated the order on December 22, were merely ministerial. Thus, Doe argues it was the oral pronouncement and journal entry on December 18 that is the pertinent time to consider with respect to the bankruptcy stay.

In *In re Soares*, the First Circuit defined a ministerial act as one that is essentially clerical in nature: "Thus, when an official's duty is delineated by, say, a law or a judicial decree with such crystalline clarity that nothing is left to the exercise of the official's discretion or judgment, the resultant act is ministerial."[7] The First Circuit concluded that when the judicial function is complete—i.e., when the judicial decision is made—those acts done in "obedience to the judge's peremptory instructions or [are] otherwise precisely defined and nondiscretionary"[8] are ministerial and not violative of the automatic stay even if undertaken after an affected party files for bankruptcy.

But we decline to adopt such an exception because it is inconsistent with Nebraska law. Neb. Rev. Stat. § 25-1301 (Reissue 2008) sets forth the relevant statutory provisions for the rendition and entry of judgments in Nebraska courts. Section 25-1301(2) provides that the "[r]endition of a judgment is the act of the court, or a judge thereof, in making and

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[6] *In re Soares*, 107 F.3d 969 (1st Cir. 1997).

[7] *Id.* at 974.

[8] *Id*.

signing a written notation of the relief granted or denied in an action." And § 25-1301(3) provides that the "entry of a judgment . . . occurs when the clerk of the court places the file stamp and date upon the judgment."

Our current version of § 25-1301 replaced an earlier version which provided multiple methods for the entry of judgment, thus leading to confusion about when an order was entered and therefore final.[9] Under the prior statute, rendition of a judgment was defined as "the act of the court, or a judge thereof, in pronouncing judgment, accompanied by the making of a notation on the trial docket, or one made at the direction of the court or judge thereof, of the relief granted or denied in an action."[10] And the time for appeal under the former statute began to run with the "rendition" of the judgment.[11] This frequently resulted in uncertainty regarding the commencement of the time for appeal. We decline to adopt the ministerial exception advocated by Doe, because to do so would be contrary to the intent behind the 1999 revisions to § 25-1301, which sought to instill certainty in the question of when a judgment was entered. After the 1999 revisions, the pronouncement of judgment and making of a trial docket entry no longer play any role in the "rendition" of a judgment.

[4] To constitute a "judgment" under § 25-1301, a judge's decision must be both rendered and entered.[12] In this case, the *rendering* of the district court's grant of summary judgment could not have occurred when the first minute entry was made on December 18, 2009, because the minute entry was not signed by the judge. Until the judge signed the order on December 22, he had not "rendered" the judgment within the meaning of § 25-1301. Even if the entry of the judgment by the court clerk was purely ministerial, the judge's signing of

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[9] Introducer's Statement of Intent, L.B. 622, Committee on Judiciary, 96th Leg., 1st Sess. (Mar. 19, 1999) (amended into 1999 Neb. Laws, L.B. 43).

[10] See § 25-1301(2) (Reissue 1995).

[11] See Neb. Rev. Stat. § 25-1912(1) (Reissue 1995).

[12] See *Kilgore v. Nebraska Dept. of Health & Human Servs.*, 277 Neb. 456, 763 N.W.2d 77 (2009).

the order was not; rather, it was an essential part of the judicial function of the "rendition" of the judgment. Moreover, the *entry* of that judgment plainly did not occur until December 22, when "the clerk of the court place[d] the file stamp and date" upon a written notation of that decision.

Thus, by the time the order granting default judgment was signed by the court (rendition) and file stamped and dated by the clerk (entry) on December 22, 2009, Red Willow Dairy and the Huffmans had the day before filed for bankruptcy. And, as is provided by 11 U.S.C. § 362(a), "a petition filed . . . operates as a stay, applicable to all entities, of . . . (1) the commencement or continuation . . . of a judicial . . . proceeding against the debtor." This stay is applicable regardless of notice.[13]

As of December 21, 2009, the order in the underlying action between Doe and Red Willow Dairy and the Huffmans had not been rendered or entered, and thus was not a judgment. The filing of the bankruptcy stayed any further proceedings, preventing the rendition and entry of the default judgment on December 22. Because neither rendition nor entry of the default judgment was accomplished before the filing of the bankruptcy action, Fireman's could not have breached any duty it might have to defend Red Willow Dairy and the Huffmans. And the underlying action between Doe and Red Willow Dairy and the Huffmans was discharged in the bankruptcy action.

We are aware of the comments in the dissent suggesting that it was "the court's judgment when pronounced" and that the entry was ministerial. The dissent relies in part on language in *Luikart v. Bredthauer*.[14] But the confusion engendered by cases like *Luikart* was addressed in the 1999 amendments to § 25-1301 which, contrary to the dissent's view, were not limited to the issue of when to take an appeal, although they were in aid of it. So too, our use of the word "ministerial," though perhaps ill chosen, in *Kilgore v. Nebraska Dept. of Health &*

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[13] See, e.g., *Constitution Bank v. Tubbs*, 68 F.3d 685 (3d Cir. 1995); 9B Am. Jur. 2d *Bankruptcy* § 1725 (2006).

[14] See *Luikart v. Bredthauer*, 132 Neb. 62, 271 N.W. 165 (1937).

Human Servs.,[15] upon which the dissent relies, was in the context of appealability.

Because the trial court has inherent authority to modify its oral ruling before its entry, we do not agree with the reasoning of the dissent to the effect that the judgment occurs when orally pronounced and that the entry of judgment on December 22, 2009, was merely ministerial. Moreover, we do not endorse execution of judgment based on the oral pronouncement in this case. Our reasoning is not at odds with federal law under § 362(a)(1), but simply applies it to the facts of this case. To adopt the reasoning of the dissent would be a setback for Nebraska procedural jurisprudence and trivialize the entry of the judgment.

Doe's assignment of error is without merit. We need not reach the assignment of error on cross-appeal filed by Fireman's.

CONCLUSION

The decision of the district court granting summary judgment to Fireman's is affirmed.

AFFIRMED.

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[15] See *Kilgore v. Nebraska Dept. of Health & Human Servs., supra* note 12.

CONNOLLY, J., dissenting.

I believe that the majority opinion has incorrectly focused on whether an order is final for purposes of an appeal instead of whether a court's act is ministerial under § 362 of the federal bankruptcy code.[1] Federal courts hold, and legal commentators agree, that postpetition ministerial acts do not violate the automatic stay of proceedings against the debtor under § 362. I would remand the cause for the court to decide the issue raised by the insurer's cross-appeal.

COURT'S ORDER DID NOT VIOLATE THE BANKRUPTCY STAY

Upon the filing of a bankruptcy petition, § 362(a)(1) treats the petition as an automatic stay of the commencement or continuation of any judicial, administrative, or other proceedings

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[1] See 11 U.S.C. § 362(a)(1) (2006 & Supp. III 2009).

against the debtor. I agree that any action that violates an automatic stay is void.[2] But under federal law, the district court's official entry of its default judgment was a ministerial act, not the continuation of a proceeding. And whether an action constitutes the "commencement or continuation" of a proceeding is a question of federal bankruptcy law—not state law.[3]

It is true that we are not bound by appellate circuit courts' interpretation of a federal statute,[4] but those decisions are, of course, strong persuasive authority. And federal courts, in analyzing whether a court's action is ministerial, do not focus on whether an order is final for the purpose of an appeal in state court. Instead, the purpose of § 362 is to balance the interests of debtors and creditors in bankruptcy proceedings.[5] And in considering whether a court's postpetition action violates an automatic stay, federal courts have drawn the line at ministerial acts. That is, acts that are merely ministerial (essentially clerical) after a court has decided a case will not violate the automatic stay. The First Circuit is not the only federal court to have concluded that postpetition ministerial acts do not violate the automatic stay when the court pronounced judgment—in a written order or from the bench—before the debtor filed a bankruptcy petition.[6]

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[2] See, e.g., *Acands, Inc. v. Travelers Cas. and Sur. Co.*, 435 F.3d 252 (3d Cir. 2006); *In re Integrated Technology Solutions, Inc.*, 417 B.R. 643 (D.N.M. 2009).

[3] Compare *In re Williams*, 703 F.2d 1055 (8th Cir. 1983).

[4] See *Strong v. Omaha Constr. Indus. Pension Plan*, 270 Neb. 1, 701 N.W.2d 320 (2005), *abrogated on other grounds, Kennedy v. Plan Administrator for DuPont Sav. and Investment Plan*, 555 U.S. 285, 129 S. Ct. 865, 172 L. Ed. 2d 662 (2009).

[5] See, e.g., *In re Pettit*, 217 F.3d 1072 (9th Cir. 2000).

[6] See, e.g., *Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522 (2d Cir. 1994); *In re Knightsbridge Development Co. Inc.*, 884 F.2d 145 (4th Cir. 1989); *In re Heaviside*, 433 B.R. 749 (E.D. Mo. 2010); *In re Aultman*, 223 B.R. 481 (W.D. Pa. 1998); 2 Michael Baccus & Howard J. Steinberg, Bankruptcy Litigation § 12:11 (2013), *available at* Westlaw BKRLIT. See, also, *In re Pettit*, *supra* note 5; *In re Carver*, 828 F.2d 463 (8th Cir. 1987). Compare *In re Vierkant*, 240 B.R. 317 (B.A.P. 8th Cir. 1999).

And Nebraska's entry of judgment statute should not affect that result.

It is true that in 1999, the Legislature amended Neb. Rev. Stat. § 25-1301 (Reissue 1995) in two ways to clarify when a party can appeal. First, the amendment provided that a court renders a judgment or order when the judge signs a written notation of its determination of the relief granted or denied. Second, the court enters the judgment or final order when the court's clerk places the file stamp and date on the judgment or final order.[7]

But through these amendments, the Legislature was clarifying the start date for the appeal period. This purpose is shown by the introducer's statement of intent[8] and the statements of the judges who testified that the previous version of § 25-1301 had caused confusion about the deadline for filing an appeal. The same bill also amended Neb. Rev. Stat. § 25-1912 (Reissue 1995) to change the start date for the 30-day appeal period from the date that the trial court rendered its judgment or final order to the date that the court entered it.[9] Finally, the Legislature amended § 25-1301(3) to specifically provide that "[f]or purposes of determining the time for appeal, the date stamped on the judgment, decree, or final order shall be the date of [the judgment's] entry."

In sum, the 1999 amendments are ministerial and solely related to the filing of an appeal. So they should not affect the efficacy of the court's judgment when pronounced. To hold otherwise will encourage parties to take actions contrary to the court's judgment before it is officially entered. And we have long recognized that a judgment is effective when pronounced even if a party may not use it for some purposes until the court has entered it:

> "The rendition of a judgment is the judicial act of the court in pronouncing the sentence of the law upon the

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[7] See, 1999 Neb. Laws, L.B. 43 § 3; § 25-1301(2) and (3) (Reissue 2008).

[8] See, Introducer's Statement of Intent, L.B. 622, Judiciary Committee, 96th Leg., 1st Sess. (Mar. 19, 1999) (amended into L.B. 43); Hearing, 96th Leg., 1st Sess. 30-41 (Mar. 19, 1999).

[9] See L.B. 43, § 8.

> facts in controversy as ascertained by the pleadings and the verdict. The entry of a judgment is a ministerial act, which consists in spreading upon the record a statement of the final conclusion reached by the court in the matter, thus furnishing external and incontestable evidence of the sentence given, and designed to stand as a perpetual memorial of its action. It is the former, therefore, that is the effective result of the litigation. In the nature of things, a judgment must be rendered before it can be entered. And not only that, but though the judgment be not entered at all, still it is none the less a judgment. The omission to enter it does not destroy it, nor does its vitality remain in abeyance until it is put upon the record. . . ." . . . ". . . 'There are certain purposes, however, for which a judgment is required to be duly entered before it can become available or be attended by its usual incidents. Thus, . . . this is prerequisite to the right to appeal. And so a judgment must commonly be docketed before it can create a lien upon land . . . . But with these exceptions, a judgment is independent of the fact of its entry. And in all cases, the distinction between rendition and entry is substantial and important.'"[10]

Under this reasoning, I disagree that the 1999 amendments alter when a court's substantive judgment of the parties' rights and obligations has effect. Even after the 1999 amendments, we have specifically characterized a court's signing and file stamping of a judgment or order as ministerial acts required for an appeal.[11] In short, I believe that the majority opinion confuses the issues. Whether an order is appealable is not the same as whether a court's act is ministerial for the purpose of violating the automatic stay in federal bankruptcy proceedings.

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[10] *Luikart v. Bredthauer*, 132 Neb. 62, 65-66, 271 N.W. 165, 167 (1937), quoting 1 Henry Campbell Black, A Treatise on the Law of Judgments § 106 (2d ed. 1902).

[11] See *Kilgore v. Nebraska Dept. of Health & Human Servs.*, 277 Neb. 456, 763 N.W.2d 77 (2009).

Here, we are not deciding whether a creditor can enforce a judgment after the debtor has filed a bankruptcy petition.[12] We are deciding only whether a court can enter a postpetition judgment that it pronounced before the debtor filed the petition. Federal courts specifically intended the exception for ministerial acts to prevent court actions like this one from violating the automatic stay. In contrast, the rule that the opinion sets out, if adopted by federal courts, would encourage debtors to try to defeat prepetition judgments against them by racing to the bankruptcy court before the court officially enters its judgment.

This case illustrates the potential problems of the rule that the majority opinion adopts. The trial court sustained Jane Doe's motion for a default judgment on Friday, December 18, 2009. Red Willow Dairy, L.L.C., and Jim Huffman and Ann Huffman filed for bankruptcy on the following Monday, December 21, before the court entered its judgment on Tuesday, December 22. If the court had entered its judgment on Monday, would we require parties to prove the times that the court entered its judgment and the debtor filed the bankruptcy petition? If a creditor claimed that the court improperly delayed the entry of judgment, would that claim require the judge to testify as a witness?

Because the federal rule avoids these problems, I find it more persuasive. I would hold that the district court erred in concluding that the Lancaster County District Court's entry of the default judgment violated the automatic stay of § 362 and was therefore void. This conclusion leads me to the issue raised by the insurer's cross-appeal: whether the court erred in failing to dismiss Doe's complaint or to grant Fireman's Fund Insurance Company (Fireman's Fund) summary judgment on Doe's claim that it breached its duty of good faith and fair dealing.

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[12] See, 11 U.S.C. § 362(a)(6); *Eskanos & Adler, P.C. v. Leetien*, 309 F.3d 1210 (9th Cir. 2002).

Cause Should Be Remanded for Court to Decide Cross-Appeal Issue

As the majority opinion states, Doe was a creditor in the bankruptcy proceeding. She entered into a settlement agreement with Red Willow Dairy and the Huffmans to assign to Doe any claims they had against Fireman's Fund in exchange for her promise not to pursue any claims against them in bankruptcy court. The record shows that Doe notified the bankruptcy court of the settlement, and for deciding this appeal, I assume that the bankruptcy court approved the settlement.[13] But we cannot decide the issue raised by the insurer's cross-appeal because the district court has not yet ruled on it.

In its cross-appeal, Fireman's Fund argues that it did not breach its duty of good faith and fair dealing in failing to defend Red Willow Dairy and the Huffmans against Doe's claim because it had good reason to deny their claim for coverage. Fireman's Fund argues that its policy's exclusion for the risk presented by Doe's claim was undebatable. As the majority opinion states, the court agreed, and Doe does not assign error to that ruling on appeal.

Instead, Doe argues that Firemen's Fund is estopped from denying coverage because it knew about Doe's claim and her motion for a default judgment. Yet, it took no steps to protect its insureds from a default judgment or to notify them that it would not defend them before the court entered the default judgment. Doe argues that an insurer cannot lead an insured to believe that it will assume responsibility for a defense and then leave the insured liable for a default judgment. Fireman's Fund responds that none of its actions could have led a reasonable insured to believe that it was assuming a defense. Leaving aside that the parties dispute the relevant facts, we generally do not consider issues that the trial court has not decided.[14] And Fireman's Fund incorrectly argues that the court erred in

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[13] See 10 Collier on Bankruptcy ¶ 9019.01 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2009).

[14] See *Conley v. Brazer*, 278 Neb. 508, 772 N.W.2d 545 (2009).

failing to decide whether it had breached the duty of good faith and fair dealing.

In April 2012, Doe moved for summary judgment on the insurer's liability. Fireman's Fund then moved for summary judgment on its defense that the default judgment was void because it violated the automatic stay in the bankruptcy proceeding. Later, Fireman's Fund moved for a summary judgment that it could not be liable for breaching a duty of good faith and fair dealing because it had no duty to defend Red Willow Dairy and the Huffmans.

The court considered these motions at the same time. It concluded that the default judgment violated the automatic stay and was void and that Fireman's Fund was therefore entitled to judgment as a matter of law. Accordingly, the court overruled Doe's motion for summary judgment and did not reach the issue whether Fireman's Fund had breached a duty of good faith and fair dealing.

The court obviously concluded that its ruling on the bankruptcy issue mooted Doe's claim and Fireman's Fund's alternative defense. And the majority opinion relies on this reasoning in declining to address the cross-appeal: "Because neither rendition nor entry of the default judgment was accomplished before the filing of the bankruptcy action, Fireman's [Fund] could not have breached any duty it might have to defend Red Willow Dairy and the Huffmans." So the trial court's ruling completely disposed of the subject matter of the litigation, and it was not error for the court to withhold a ruling on a moot issue.[15] But because I disagree with the court's ruling regarding the effect of the automatic stay, I would remand the cause for the court to decide the issue raised by the cross-appeal.

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[15] See *Big John's Billiards v. State*, 283 Neb. 496, 811 N.W.2d 205 (2012).

STATE OF NEBRASKA, APPELLEE, V. MATTHEW C. SCHULLER, APPELLANT.

843 N.W.2d 626

Filed February 21, 2014. No. S-13-221.

1. **Constitutional Law: Search Warrants: Affidavits.** A claim that an affidavit is insufficient to justify issuance of a search warrant is a Fourth Amendment claim.
2. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
3. **Search Warrants: Affidavits: Probable Cause.** In *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), the U.S. Supreme Court held that a search warrant may be invalidated if a defendant proves that the affiant officer knowingly and intentionally, or with reckless disregard for the truth, included in his or her affidavit false or misleading statements which were necessary to establish probable cause. This rationale extends to omissions in warrant affidavits of material information.
4. **Trial: Convictions: Appeal and Error.** An appellate court will sustain a conviction in a bench trial of a criminal case if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support that conviction.
5. **Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented, which are within a fact finder's province for disposition. Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
6. **Statutes.** Statutory language is to be given its plain and ordinary meaning.
7. **Statutes: Criminal Law.** The definition of an act forbidden by statute, but not defined by it, may be ascertained by reference to the common law.
8. **Evidence: Proof.** Actual possession is synonymous with physical possession. Constructive possession, however, may be proved by mere ownership, dominion, or control over contraband itself, coupled with the intent to exercise control over the same.
9. **Criminal Law: Evidence: Words and Phrases.** Under Neb. Rev. Stat. § 28-813.01 (Cum. Supp. 2012), "possess" includes constructive possession.
10. **Criminal Law: Evidence.** A defendant cannot intentionally procure and subsequently dispose of a depiction of child sexually abusive material without having either actual or constructive possession.

Appeal from the District Court for Lancaster County: KAREN B. FLOWERS, Judge. Affirmed.

Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Melissa R. Vincent for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

CONNOLLY, J.

I. SUMMARY

Matthew C. Schuller admitted to periodically searching for, downloading, viewing, and then deleting child pornography computer files. Despite his efforts to delete the files, a forensic examination revealed remnants on his hard drive. Following a bench trial, the district court found Schuller guilty of knowingly possessing child pornography. The issues are (1) whether the investigator's failure to explain in his affidavit that dynamic Internet Protocol (IP) addresses can change tainted the probable cause determination and (2) whether the evidence was sufficient to find that Schuller "knowingly possess[ed]" child pornography as stated in Neb. Rev. Stat. § 28-813.01(1) (Cum. Supp. 2012). We conclude that the investigator's omission did not affect the probable cause determination and that the State adduced sufficient evidence to support Schuller's conviction. We affirm.

II. BACKGROUND

1. INVESTIGATION

In investigating child pornography crimes, law enforcement agencies use third-party databases to identify IP addresses associated with suspected child pornography files. An IP address is a unique number that an Internet service provider assigns to a computer or other device on the Internet.[1] These

[1] See, e.g., *Patco Const. Co., Inc. v. People's United Bank*, 684 F.3d 197 (1st Cir. 2012).

databases identify IP addresses which have (through peer-to-peer file-sharing software) made available for download known or suspected child pornography files. Essentially, peer-to-peer file-sharing software connects many different computers across the Internet and allows them to share their files with other connected computers.[2]

Law enforcement agencies then use specialized software to automatically browse for and download suspected child pornography files from those IP addresses. Once an IP address is confirmed to have child pornography files, law enforcement agencies subpoena the Internet service provider for the relevant subscriber information. That information generally includes a name and the subscriber's physical address, and then law enforcement agencies obtain a warrant, seize evidence, and make arrests.

Sgt. John Donahue, the lead investigator, followed that process. On July 16, 2011, Donahue used a program called E-Phex to browse IP addresses within his jurisdiction and connected to a computer with a specific IP address. E-Phex obtained a list of that computer's shared files (files available for download through the file-sharing software), which contained one suspected child pornography file. On July 22, Investigator Corey Weinmaster subpoenaed the Internet service provider and requested the subscriber information for that IP address for various times on July 17 and 19. On July 28, the Internet service provider sent the requested information, which identified an individual (presumably Schuller's father) as the account holder, with a specific physical address located on Blackstone Road in Lincoln, Nebraska. Further surveillance of that IP address revealed that an additional 13 suspected child pornography files were linked with that IP address between July 17 and September 21. Donahue downloaded four of those files and confirmed that they were child pornography.

On September 27, 2011, Donahue applied for and received a search warrant. In his affidavit in support of his request, Donahue set out the above facts. He also included other

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[2] See, e.g., *U.S. v. Vadnais*, 667 F.3d 1206 (11th Cir. 2012).

significant information regarding his training, the typical investigation process in these kinds of cases, the type of evidence he hoped to find, and the types of items he wished to seize. A county judge granted his request for a warrant.

2. Police Execute Search Warrant

On September 30, 2011, Donahue executed the search warrant. During the search, officers located and seized three computers, including Schuller's laptop. Weinmaster seized the laptop, which at the time was running a disk-wiping program. A disk-wiping program overwrites data, which permanently removes it from the hard drive.[3] Weinmaster removed the battery from the laptop to stop the program from running. As the search continued, Donahue met with Schuller, who agreed to speak with Donahue.

Schuller, 20 years old, admitted that he had been using peer-to-peer file-sharing software to download child pornography since he was 14 years old. Schuller admitted that he would search for files using search terms like "pedo" and "boys" to find movies he wanted to watch. He would then download those movies, watch them, and then delete them. "Deleting" a computer file is a misnomer, because doing so does not actually remove it from the computer. Deleting a file only marks the location as available to be overwritten; the file is not actually removed until that happens.[4] Schuller admitted that he had downloaded hundreds of movies (though they apparently were all the same 10 to 15 movies, just repeatedly downloaded and deleted) and that he had downloaded movies just a few days before.

Schuller then accompanied Donahue to the Lincoln Police Department, where he again agreed to speak with Donahue.

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[3] See, e.g., Brad Chacos, How to securely erase your hard drive, http://www.pcworld.com/article/261702/how_to_securely_erase_your_hard_drive.html (Sept. 3, 2012) (explaining that to permanently delete computer data requires software which overwrites that data) (last visited Feb. 10, 2014).

[4] See Ty E. Howard, *Don't Cache Out Your Case: Prosecuting Child Pornography Possession Laws Based on Images Located in Temporary Internet Files*, 19 Berkeley Tech. L.J. 1227 (2004).

In this interview, Schuller made the same admissions he had made earlier at his home. In addition, he admitted that when he deleted the files, he used a disk-wiping program (which would overwrite the files) to remove any traces of them from his computer. He also admitted that he knew that what he had been doing was illegal and that his inability to stop doing it was depressing. Eventually, he requested a lawyer and Donahue ended the interview.

3. Information and Motion to Suppress

The State filed an information against Schuller on December 9, 2011, for possession of child pornography.[5] Before trial, Schuller moved to suppress all evidence resulting from the earlier search and seizure. Schuller generally argued that the underlying basis for Donahue's conclusion that the files were child pornography, "SHA1 hash values," was not reliable. SHA1 hash values are digital signatures for files on a peer-to-peer network; all files have a SHA1 hash value, and if two files have the same one, they are the *exact* same file. Schuller also argued that, under *Franks v. Delaware*,[6] Donahue's affidavit in support of the search warrant was materially misleading because it did not include any information regarding the difference between dynamic and static IP addresses. Generally, the difference is that dynamic IP addresses can change, while static ones cannot.

The district court overruled Schuller's motion. The court found no need to address the reliability of SHA1 hash values, because Donahue "personally observe[d] images of child pornography associated with Schuller's IP address and told the County Judge so." Schuller did not appeal this ruling. Regarding Schuller's *Franks* challenge, the court noted that the file-sharing software assigned a functionally unique identifier to each computer on the network. This identifier, known

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[5] See § 28-813.01.

[6] *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

as the GUID, identified the specific computer making the child pornography files available to download. The court then emphasized that neither the GUID nor the IP address associated with it ever changed over the course of the investigation. As such, "[t]here was never a question that the pornography Donahue identified might have come from somewhere other than a single computer located at [the] Blackstone Road [address]." Thus, the court concluded that there was no reason for Donahue to discuss the difference between dynamic and static IP addresses.

4. Trial, Verdict, and Sentence

At the bench trial, Donahue was the only witness. Generally, Donahue testified regarding his investigation, the various computer programs and processes involved, his interviews with Schuller, and his forensic examination of Schuller's laptop. Regarding his examination of Schuller's laptop, Donahue explained that he used a program known as Forensic Toolkit. This program essentially copies the target hard drive and then looks for and retrieves all noteworthy images and files on the drive. This includes hidden files, deleted files, and sometimes encrypted files.

Going through the Forensic Toolkit report, Donahue explained that he had found 88 graphic files on the hard drive. These were still images of child pornography. Donahue explained that 10 of these files were not "carved" files, meaning that they were not deleted, in the sense that they were accessible to Schuller. Donahue explained that Schuller could have "copied, printed, e-mailed, [or] saved" these 10 files. He later clarified that Schuller apparently attempted to delete those files, but that some backup function saved them and moved them to another directory in the computer. So, although Schuller could have accessed and manipulated these files, he did not necessarily know they existed or where they were. The other 78 files were "carved," meaning that they had been deleted and that Schuller, an ordinary computer user, no longer had access to these files. Donahue also explained that although the wiping program had been running, the program

itself maintained a record of the names of files it had overwritten. These names were consistent with names for child pornography files.

Following the bench trial, the court found Schuller guilty. The court sentenced Schuller to 3 years' probation and ordered him to register as a sex offender.

III. ASSIGNMENTS OF ERROR

Schuller assigns, restated, that the court erred in (1) denying his motion to suppress and (2) finding sufficient evidence to find Schuller guilty of knowingly possessing child pornography.

IV. ANALYSIS

1. Motion to Suppress

Schuller argues that Donahue's failure to explain in his affidavit that dynamic IP addresses can change tainted the probable cause determination. As such, Schuller argues that under *Franks*,[7] the resulting warrant was invalid and the court should have suppressed the seized evidence. The State disagrees. It argues that because the IP address at issue was almost certainly assigned to Schuller's home throughout the investigation, the fact that dynamic IP addresses can change was immaterial. We agree with the State.

(a) Standard of Review

[1,2] A claim that an affidavit is insufficient to justify issuance of a search warrant is a Fourth Amendment claim.[8] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, we apply a two-part standard of review. Regarding historical facts, we review the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that we review independently of the trial court's determination.[9]

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[7] See *id.*

[8] See, e.g., *State v. Nuss*, 279 Neb. 648, 781 N.W.2d 60 (2010).

[9] See, e.g., *State v. Sprunger*, 283 Neb. 531, 811 N.W.2d 235 (2012).

(b) Analysis

[3] In *Franks*,[10] the U.S. Supreme Court held that a search warrant may be invalidated if a defendant proves that the affiant officer "knowingly and intentionally, or with reckless disregard for the truth," included in his or her affidavit false or misleading statements which were necessary to establish probable cause.[11] Courts have extended the *Franks* rationale to "omissions in warrant affidavits of material information."[12] In this "so-called reverse-*Franks* situation," if the defendant shows that the police knowingly and intentionally, or with reckless disregard for the truth, omitted information material to a probable cause finding, a reviewing court will reexamine the affidavit (with the omitted information) and determine whether it still establishes probable cause.[13] If it does not, then *Franks* requires that "the search warrant . . . be voided and the fruits of the search excluded."[14]

Schuller argues that such is the case here. Schuller argues that dynamic IP addresses (such as in this case) can change, while static IP addresses cannot. Schuller argues that Donahue knowingly and intentionally, or with reckless disregard for the truth, omitted that information from his affidavit and that doing so "tainted the probable cause determination."[15] Essentially, this is because, as a dynamic IP address, there was no guarantee that it remained assigned to Schuller's home throughout the investigation.

We conclude that Donahue's omission was immaterial to the probable cause determination and therefore did not run afoul of *Franks*. At the hearing, Donahue testified that he monitored the IP address' activity from July 16 to September 27, 2011.

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[10] See *Franks*, *supra* note 6, 438 U.S. at 155.

[11] See, also, *U.S. v. Smith*, 715 F.3d 1110 (8th Cir. 2013).

[12] Annot., 72 A.L.R.6th 437, 449 (2012). See, also, *Smith*, *supra* note 11; *Sisson v. State*, 903 A.2d 288 (Del. 2006); *State v. Spidel*, 10 Neb. App. 605, 634 N.W.2d 825 (2001); *Smith v. Sheriff*, 506 Fed. Appx. 894 (11th Cir. 2013).

[13] See *Sisson*, *supra* note 12, 903 A.2d at 300.

[14] *Franks*, *supra* note 6 at 156.

[15] Brief for appellant at 14.

Donahue testified that throughout that period, the IP address, and its associated GUID, never changed. Recall that a GUID is a functionally unique identifier assigned by the file-sharing software to each computer on the network. Donahue testified that in other words, the same computer repeatedly shared child pornography using the same IP address. This suggests, as the State argues, that the IP address was assigned to only a single location—Schuller's home—throughout the investigation. This led the district court to conclude, correctly in our view, that "[t]here was never a question that the pornography Donahue identified might have come from somewhere other than a single computer located at [the] Blackstone Road [address]." We agree with the State and the court that, in this case, omitting the challenged information was immaterial to the probable cause determination.

We briefly note that Schuller emphasizes that the IP address was initially associated with child pornography files on July 16, 2011, but that police requested the subscriber information for the IP address for July 17 and 19. Schuller argues that "since law enforcement asked for information about the holder of that IP address on a different date, the failure to inform the magistrate that on a different date, that IP address could have been assigned to a different holder, would have undercut the entire theory of the investigation."[16]

We do not agree. Donahue testified that *from July 16* to September 27, 2011, neither the GUID nor the IP address ever changed. Considering the subscriber information, the most likely conclusion is that the IP address was also assigned to Schuller's home on July 16. But even were we to agree with Schuller about the alleged uncertainty of the IP address' assigned location on July 16, it would not "undercut the entire theory of the investigation." The fact remains that police observed that IP address sharing child pornography files on July 17 and 19, and further observed that IP address sharing child pornography files at various times up to September 21. As explained above, during those times, there was no real question that the IP address was assigned to Schuller's home,

[16] *Id.* at 15.

because neither the IP address nor the GUID ever changed during that time. This assigned error has no merit.

2. Sufficiency of Evidence

Schuller argues that the evidence was insufficient to conclude that he "knowingly possess[ed]" child pornography. He questions the applicability of the common-law principles of constructive possession to computer files downloaded from the Internet, and he argues that even if they do apply, the evidence was insufficient to show control or intent to control child pornography. We conclude that the principles of constructive possession apply here. And because Schuller repeatedly searched for, downloaded, viewed, and deleted child pornography, we conclude that the evidence was sufficient to support a finding that he knowingly possessed it.

(a) Standard of Review

[4,5] We will sustain a conviction in a bench trial of a criminal case if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support that conviction.[17] In making this determination, we do not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented, which are within a fact finder's province for disposition.[18] Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[19]

(b) Analysis

Section 28-813.01(1) explains that "[i]t shall be unlawful for a person to knowingly possess any visual depiction of sexually explicit conduct . . . which has a child . . . as one of its participants or portrayed observers." The parties do not dispute that this case involves "visual depiction[s] of

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[17] See *State v. Lamb*, 280 Neb. 738, 789 N.W.2d 918 (2010).

[18] See *id.*

[19] See *id.*

sexually explicit conduct" involving a child (child pornography). Instead, the sole issue is whether the evidence was sufficient to convict Schuller of "knowingly possess[ing]" child pornography.

[6,7] Neb. Rev. Stat. § 28-1463.02 (Cum. Supp. 2012) defines several key words and phrases used in § 28-813.01, such as "child," "sexually explicit conduct," and "visual depiction." But it does not define "knowingly possess." Several doctrines, however, inform our interpretation of that phrase. It is an oft-stated rule that "'[s]tatutory language is to be given its plain and ordinary meaning . . . .'"[20] We have also explained that "[t]he definition of an act forbidden by statute, but not defined by it, may be ascertained by reference to the common law."[21]

[8] Black's Law Dictionary defines "possess" as "[t]o have in one's actual control; to have possession of."[22] It defines "possession" to include, among other things, both actual and constructive possession,[23] and our common law similarly recognizes both.[24] Actual possession is synonymous with physical possession.[25] Constructive possession, however, may be proved by mere ownership, dominion, or control over contraband itself, coupled with the intent to exercise control over the same.[26]

The initial question is whether "possess" in § 28-813.01 includes constructive possession. In other contexts, we have come to different conclusions. For example, in the narcotics context, we have long held that possession may be either actual or constructive.[27] In contrast, we have held that possession of

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[20] *State v. Johnson*, 269 Neb. 507, 518, 695 N.W.2d 165, 174 (2005).

[21] *State v. Mattan*, 207 Neb. 679, 684, 300 N.W.2d 810, 813 (1981).

[22] Black's Law Dictionary 1281 (9th ed. 2009).

[23] See *id.*

[24] See *State v. Garza*, 256 Neb. 752, 592 N.W.2d 485 (1999).

[25] See *id.*

[26] See *id.*

[27] See, e.g., *id.*; *State v. Faircloth*, 181 Neb. 333, 148 N.W.2d 187 (1967).

a weapon during the commission of a felony does not include constructive possession.[28]

[9] We conclude that "possess" in § 28-813.01 must include constructive possession. Unlike our prior cases, here we are not discussing tangible objects such as narcotics or a physical weapon. Instead, we are discussing computer files, which are intangible objects. It is difficult to see how a person could actually possess, that is, physically possess, a computer file. As such, if "possess" in § 28-813.01 did not include constructive possession, it would seemingly be impossible to prosecute possession of computer files containing child pornography. This goes against the Legislature's clear intent, as derived from the statutory language. Section 28-1463.02 explains that "[v]isual depiction means live performance or photographic representation and includes any undeveloped film or videotape *or data stored on a computer disk or by other electronic means which is capable of conversion into a visual image, . . . whether made or produced by electronic, mechanical, computer, digital, or other means*."[29] We hold that, under § 28-813.01, "possess" includes constructive possession.[30]

Recall that constructive possession may be proved by mere ownership, dominion, or control over contraband itself, coupled with the intent to exercise control over the same.[31] With that in mind, the question is whether the evidence was sufficient for a rational trier of fact to have found beyond a reasonable doubt that Schuller "knowingly possess[ed]" child pornography. We conclude that it was.

It bears emphasizing that Schuller did not simply click on an innocuous banner advertisement and end up at a child pornography Web site; instead, he installed and used file-sharing software to search for and download child pornography. Donahue testified as to the various steps Schuller would have taken to use the software: "He would have to open up

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[28] See *Garza*, *supra* note 24.

[29] § 28-1463.02(6) (emphasis supplied).

[30] Cf. *People v. Flick*, 487 Mich. 1, 790 N.W.2d 295 (2010).

[31] See *Garza*, *supra* note 24.

the LimeWire client. He would have to put in search terms that are associated with child pornography. He would view the title of the file, possibly the extension and double click on it to start the program downloading the file." Donahue testified that the forensic examination revealed that Schuller did in fact download the files, which were identifiable child pornography videos.

Once the downloads were complete, Schuller could have done any number of things with the file, such as change its name, relocate it, and, of course, view it, for as many times as he wished. The record shows that Schuller viewed the files and that, once done, he deleted them and used a wiping program to remove all traces of them from his computer, though he was ultimately unsuccessful in doing so. In an interview with Donahue, Schuller admitted essentially all of these facts. All of this shows both control and intent to control, which satisfies the elements of constructive possession. There is also no question that Schuller *knowingly* possessed those files. His use of the file-sharing software and his confession, among other things, confirm that he acted knowingly.

Also, the evidence was sufficient to satisfy the other elements of the crime. Schuller, in his reply brief, admits that "the uncontested evidence is that he searched the internet for images of child pornography by using file sharing software that allowed him to obtain such images from other computers and view those images on his computer."[32] Donahue averred in his affidavit that he downloaded and watched several of the videos available for download from Schuller's computer; based on Donahue's summaries of those videos, they constituted child pornography. Donahue also testified that several of the files available for download from Schuller's computer had SHA1 hash values identified as child pornography files. There was no question that this case involved images and videos of child pornography.

The evidence was also sufficient to conclude that Schuller's knowing possession occurred within the timeframe alleged in the information. Not only were his IP address and GUID

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[32] Reply brief for appellant at 2.

associated with child pornography files during that time, but Schuller admitted to having searched for, downloaded, viewed, and deleted child pornography files a couple days before his arrest. The evidence was sufficient to support finding, beyond a reasonable doubt, that Schuller knowingly possessed child pornography[33] within the timeframe alleged in the information.

Obviously, Schuller disagrees, and he makes a variety of arguments as to why our conclusion is incorrect. He argues that Nebraska law, unlike federal law, does not criminalize the mere viewing of child pornography, but only its possession,[34] and he asserts that all he did was the former. He also argues that downloading alone could not be sufficient evidence of possession. Notably, too, he argues, for multiple reasons, that there was simply no evidence that he intended to exercise control over child pornography. Specifically, he emphasizes that there was no evidence he "copied, saved, emailed, put on a hard drive or disk" any child pornography,[35] and that his deleting and wiping of the child pornography files indicated an intent *not* to control them.

We find these arguments unpersuasive. First, this is not a case of "mere viewing." In the "cache" file context, one commentator[36] gives a helpful example of a "mere viewing" situation: An office worker intentionally seeks out child pornography on various Web sites, and views and manipulates those pictures (e.g., enlarges them). An innocent coworker happens to go into the office while the office worker does this and sees the images on the computer screen for several seconds. The innocent coworker had not affirmatively sought out the child pornography, nor did he have any ability to control or manipulate the images. He therefore did not knowingly possess those images. Unlike the innocent worker in that hypothetical,

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[33] See, *U.S. v. Haymond*, 672 F.3d 948 (10th Cir. 2012); *U.S. v. McArthur*, 573 F.3d 608 (8th Cir. 2009); *U.S. v. Romm*, 455 F.3d 990 (9th Cir. 2006); *State v. McKinney*, 699 N.W.2d 460 (S.D. 2005).

[34] Compare § 28-813.01 with 18 U.S.C. § 2252(a)(4)(B) (2012).

[35] Reply brief for appellant at 6.

[36] Howard, *supra* note 4 at 1267.

however, Schuller did not "merely view" child pornography. Instead, he repeatedly searched for, downloaded, viewed, and then deleted child pornography. He did this intentionally and with the specific purpose to do so, and he used file-sharing software to achieve his ends. This constitutes knowing possession—not mere viewing.

Second, we agree that just because child pornography was downloaded onto a computer does not necessarily mean that there was knowing possession. Take, for example, a person who was legally browsing adult pornography online but mistakenly clicked on a link leading him to a child pornography Web site, which he immediately closed. The record shows that, in such a situation, child pornography would be downloaded to the computer's "cache" folder as temporary Internet files, through no further action by the user. In such a case, the person would not be guilty of knowingly possessing child pornography—he neither downloaded the files knowingly nor constructively possessed them, because there was no intent to control them. But again, as with Schuller's "mere viewing" argument, that is not what we have here. Schuller repeatedly searched for, downloaded, viewed, and then deleted child pornography files.

Third, as explained above, the record shows sufficient evidence to conclude that Schuller intended to control child pornography files. It is true that Donahue agreed that there was no evidence that Schuller "copied, saved, emailed, [or] put on a hard drive or disk" child pornography files. But we understand Donahue's testimony to be that, *outside of specifically downloading the child pornography files*, Schuller did not otherwise copy, save, e-mail, or put them on a hard drive or disk. To conclude otherwise, as Schuller implicitly suggests, would simply be wrong. By intentionally downloading the files through the file-sharing software, Schuller saved those files onto his hard drive; they were in fact located in the "Saved" folder. We understand that the file-sharing software, by default, designated that location for completed downloads (though an experienced user, as Schuller admittedly was, would likely know how to change that location). But regardless, Schuller knew that he was saving these files to his hard drive by downloading them

through the software. And he obviously knew where they were and how to access them, because he viewed them and later deleted them.

[10] We also do not agree that Schuller's deleting the files could indicate only "an intention to ***not*** take control over," and therefore not possess, the files.[37] In reviewing the sufficiency of the evidence, we give every reasonable inference to the State.[38] It seems reasonable to infer that Schuller deleted the files to hide evidence of his earlier knowing possession.[39] That being the case, a reasonable fact finder could infer a consciousness of guilt[40] and consider that as evidence that Schuller was in fact guilty of the crime charged, including the intent element.[41] As the Michigan Supreme Court observed, "a defendant cannot intentionally procure and subsequently dispose of a depiction of child sexually abusive material without having either actual or constructive possession."[42]

Finally, in his reply brief and at oral argument, Schuller argued that the partial dissent in *People v. Flick*[43] and the decision in *U.S. v. Flyer*[44] supported finding that Schuller did not "knowingly possess" child pornography. Because of Schuller's express and heavy reliance on these cases, we will address them explicitly. But we conclude that Schuller's reliance on these cases is misplaced.

In *Flick*, the partial dissent noted that for the defendants to have constructively possessed certain images, they had to have had not only the ability or power to exercise dominion or

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[37] Brief for appellant at 17 (emphasis in original).

[38] See *Lamb*, *supra* note 17.

[39] See, *People v. Kent*, 79 A.D.3d 52, 910 N.Y.S.2d 78 (2010); *Crabtree v. Commonwealth*, No. 2011-CA-000452-MR, 2012 Ky. App. Unpub. LEXIS 1030 (Ky. App. Aug. 17, 2012) (unpublished opinion). See, also, *U.S. v. Upham*, 168 F.3d 532 (1st Cir. 1999).

[40] See *Kent*, *supra* note 39.

[41] See *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008).

[42] *Flick*, *supra* note 30, 487 Mich. at 17, 790 N.W.2d at 304.

[43] *Flick*, *supra* note 30 (Cavanagh, J., concurring in part, and in part dissenting).

[44] *U.S. v. Flyer*, 633 F.3d 911 (9th Cir. 2011).

control, but also the intent to exercise that dominion or control. It argued that while the defendants could have "print[ed], resiz[ed], sav[ed], shar[ed], post[ed], e-mail[ed], or delet[ed]" the images, there was no evidence that they intended to do so and, therefore, there was no evidence of constructive possession.[45] Schuller emphasizes that, as with Michigan law, Nebraska requires both control and intent to exercise control to have constructive possession. And he argues that there was "no evidence, direct or circumstantial, to establish that [he] copied, saved, emailed, put on a hard drive or disk any of the files . . . or that he ever intend[ed] to do so."[46]

But as we explained above, that is not correct. The record shows that Schuller used file-sharing software to intentionally search for and download (and therefore save) child pornography files onto his hard drive. And the record also shows that he intentionally viewed and then deleted those files and that this was a repeated process. This is evidence of both his control and his intent to control. This is a far different situation from that in *Flick*. There, the partial dissent characterized the issue as whether the defendants had knowingly possessed child pornography by "intentionally accessing and viewing prohibited images on websites."[47] *Flick* did not involve, at least in the partial dissent's reading of the record, the intentional downloading of files; rather, the only downloaded files at issue were temporary Internet files that the defendants were apparently unaware of.[48] We find the partial dissent inapplicable here.

We conclude that Schuller's reliance on *Flyer* is also misplaced. There, the Ninth Circuit reversed a defendant's conviction for possession of child pornography. The particular files were located in the unallocated space of a computer; in other

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[45] *Flick, supra* note 30, 487 Mich. at 33, 790 N.W.2d at 313 (Cavanagh, J., concurring in part, and in part dissenting).

[46] Reply brief for appellant at 6.

[47] *Flick, supra* note 30, 487 Mich. at 30, 790 N.W.2d at 312 (Cavanagh, J., concurring in part, and in part dissenting).

[48] See *Flick, supra* note 30.

words, they had been deleted. The Ninth Circuit noted that "[e]ven if retrieved, all that can be known about a file in unallocated space (in addition to its contents) is that it once existed on the computer's hard drive. All other attributes—including when the file was created, accessed, or deleted by the user—cannot be recovered."[49] The court reasoned that because there was no evidence that the defendant knew of the files or that he could access them, there was no way that he could have exercised dominion or control over them. And in response to the government's argument that deletion equaled dominion and control, the Ninth Circuit reasoned:

> [D]eletion of an image alone does not support a conviction for knowing possession of child pornography on or about a certain date . . . . No evidence indicated that on or about April 13, 2004, [the defendant] could recover or view any of the charged images in unallocated space or that he even knew of their presence there.[50]

As such, the Ninth Circuit reversed the conviction.[51]

But as one federal district court noted,

> it is important to read with care the charge, the evidence, and the prosecution's concessions in *Flyer*. The case does not say that a defendant is not guilty of knowing possession of child pornography if the only identified images of child pornography are found in unallocated space or internet cache.[52]

It is important to note that the government charged the defendant in *Flyer* with possessing child pornography only "on or about April 13, 2004," the day that the government seized his desktop computer. The desktop computer (1) did not have file-sharing software (unlike his laptop) and (2) contained only deleted images. And, as explained above, the government

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[49] *Flyer, supra* note 44, 633 F.3d at 918.

[50] *Id.* at 920.

[51] See *Flyer, supra* note 44.

[52] *United States v. Carpegna*, Nos. CR 07-13-H-DWM, CV 12-07-H-DWM, CR 08-14-M-DWM, CV 12-10-M-DWM, 2013 U.S. Dist. LEXIS 115002 at *10-11 (D. Mont. Aug. 14, 2013).

conceded there was no evidence that the defendant knew of those images, that he could access them, or that he had ever exercised dominion or control over them.[53]

In contrast, here the information does not focus on the day police seized the computer. As the State acknowledged at oral argument, had that been the case, it would have been exceedingly difficult (if not impossible) to prove knowing possession of the deleted files, because the evidence showed that Schuller could not access those files and likely did not even know they were there. But, it is important that the information alleges that Schuller knowingly possessed child pornography at various times from July 15 to September 30, 2011. Unlike *Flyer*, the allegations in this case did not rest solely on the knowing possession of the deleted images; rather, the deleted images were also evidence of Schuller's prior possession, i.e., when he searched for, downloaded, and viewed child pornography (and before he deleted it).[54] We also find *Flyer* inapplicable.

V. CONCLUSION

We conclude that the district court did not err in denying Schuller's motion to suppress. That dynamic IP addresses can change was immaterial to the probable cause determination in this case. We also conclude that the evidence was sufficient to support Schuller's conviction for knowingly possessing child pornography. We affirm.

AFFIRMED.

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[53] See *Flyer, supra* note 44.

[54] See, *Haymond, supra* note 33; *McArthur, supra* note 33; *Romm, supra* note 33; *Upham, supra* note 39; *Kent, supra* note 39; *McKinney, supra* note 33; *Crabtree, supra* note 39.

STATE OF NEBRASKA, APPELLEE, V. JAMES P. DRAGON, APPELLANT.

843 N.W.2d 618

Filed February 21, 2014. No. S-13-386.

1. **Postconviction: Appeal and Error.** In appeals from postconviction proceedings, an appellate court independently resolves questions of law.
2. **Postconviction: Constitutional Law.** A trial court's ruling that the petitioner's allegations are refuted by the record or are too conclusory to demonstrate a violation of the petitioner's constitutional rights is not a finding of fact—it is a determination, as a matter of law, that the petitioner has failed to state a claim for postconviction relief.
3. **Postconviction: Constitutional Law: Appeal and Error.** In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.
4. **Postconviction: Constitutional Law: Proof.** In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable.
5. ____: ____: ____. A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution.
6. **Postconviction: Appeal and Error.** If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing.
7. **Constitutional Law: Effectiveness of Counsel.** A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial.
8. **Effectiveness of Counsel: Proof: Appeal and Error.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. A court may address the two prongs of this test, deficient performance and prejudice, in either order.
9. **Effectiveness of Counsel.** In addressing the "prejudice" component of the test in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), a court focuses on whether a trial counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.
10. **Effectiveness of Counsel: Proof: Words and Phrases.** To show prejudice under the prejudice component of the test in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), there must be a reasonable probability that but for the deficient performance, the result of the proceeding would have

been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

11. **Postconviction: Effectiveness of Counsel: Appeal and Error.** Where a defendant's trial counsel was also his or her appellate counsel, a postconviction proceeding is the defendant's first opportunity to claim that trial counsel provided ineffective assistance.

Appeal from the District Court for Douglas County: J RUSSELL DERR, Judge. Affirmed.

James P. Dragon, pro se.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

James P. Dragon appeals the order of the district court for Douglas County in which the court denied his motion for postconviction relief without an evidentiary hearing. Dragon, acting pro se, sought relief with respect to his conviction for second degree murder, for which he was serving a sentence of imprisonment for 50 years to life. We affirm.

STATEMENT OF FACTS

In 2006, Dragon was charged with second degree murder and use of a deadly weapon to commit a felony in connection with the shooting death of Edith Anne Moore. Pursuant to a plea agreement, Dragon pled guilty to second degree murder and the State dropped the weapon charge.

The factual basis for Dragon's plea showed that an attorney contacted Omaha police saying that Dragon had informed him that "something bad" had happened at Dragon's house the night before. Accompanied by the attorney, Dragon went to the police station and gave police consent to search his house. Police found what appeared to be blood in various parts of Dragon's house, and they found Moore's body on a plastic sheet in a basement bathroom. Police observed what appeared to be gunshot wounds to Moore's shoulder and back. An

autopsy showed that Moore had died of gunshot wounds, one of which pierced the aorta, heart, and lungs.

Investigators learned that Dragon and Moore had been in a relationship for some years but had broken up 6 months to a year earlier. In a police interview, one of Dragon's brothers said that Dragon had told him that something bad had happened to Moore and that he had done something he was going to regret. A second brother acknowledged that the murder weapon, which police found in the second brother's home, belonged to him but that he did not know it had left his house. Dragon's mother interrupted the interview of one of the brothers to say that "Jimmy" was sorry for what he had done.

The district court found Dragon guilty of second degree murder based on his plea and the State's factual basis. The court sentenced Dragon to imprisonment for a term of 50 years to life. A direct appeal was filed in which Dragon's sole assignment of error was that the sentence was excessive. On September 20, 2007, we granted the State's motion for summary affirmance in case No. S-07-620.

In August 2012, Dragon filed a pro se motion for postconviction relief in which he made claims of an excessive sentence and ineffective assistance of counsel in connection with his sentencing. The district court sustained the State's motion to deny an evidentiary hearing and dismissed Dragon's motion for postconviction relief.

In its order, the court characterized Dragon's postconviction claims as being claims that he received an excessive sentence and that his trial counsel was ineffective for (1) failing to present mitigating evidence and (2) promising that he would receive a specific sentence. With regard to Dragon's claim of an excessive sentence, the court determined that the claim was procedurally barred, because the issue of an excessive sentence had been raised and resolved against Dragon on direct appeal and a postconviction action could not be used to revisit or modify the sentence. With regard to Dragon's claim that counsel was ineffective for failing to present mitigating evidence which might bear on guilt, the court noted that Dragon did not allege any specific mitigating evidence

that counsel should have presented but did not present. To the extent that Dragon claimed mitigating facts should have been presented at sentencing, the court stated that the record contradicted Dragon's claim because it showed that counsel had presented mitigating evidence, including letters of support and argument regarding Dragon's cooperation with law enforcement, his successful completion of probation from a previous conviction for felony assault, and his acceptance of responsibility for his actions in this case. With regard to Dragon's claim that counsel was ineffective for promising that the court would impose a particular sentence, the court noted that the colloquy at Dragon's plea hearing indicated that Dragon specifically acknowledged that he understood that he could receive a life sentence, that no one had led him to believe he would receive a lesser sentence as a result of his plea, and that no promises had been made by anyone regarding his sentence. The court concluded that Dragon was not entitled to an evidentiary hearing, and it dismissed his motion for postconviction relief.

Dragon appeals the denial of his motion for postconviction relief without an evidentiary hearing.

ASSIGNMENTS OF ERROR

Dragon generally claims that the district court erred when it rejected his claims of ineffective assistance of counsel and denied his motion for postconviction relief without an evidentiary hearing. He specifically asserts that counsel (1) promised that he would not receive a life sentence if he pled guilty and (2) failed to present mitigating evidence at the sentencing phase.

STANDARDS OF REVIEW

[1-3] In appeals from postconviction proceedings, we independently resolve questions of law. *State v. Baker*, 286 Neb. 524, 837 N.W.2d 91 (2013). A trial court's ruling that the petitioner's allegations are refuted by the record or are too conclusory to demonstrate a violation of the petitioner's constitutional rights is not a finding of fact—it is a determination, as a matter of law, that the petitioner has failed to state a claim

for postconviction relief. *Id*. Thus, in appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief. *Id.*

ANALYSIS

Dragon claims that the district court erred when it denied his claims of ineffective assistance of counsel without conducting an evidentiary hearing. He argues that a hearing was warranted on both his claim that counsel mistakenly advised him that he would not receive a life sentence if he entered a plea and his claim that counsel failed to present mitigating evidence during the sentencing phase. We find no merit to Dragon's assignment of error with respect to either claim.

[4] The Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008 & Cum. Supp. 2012), provides that postconviction relief is available to a prisoner in custody under sentence who seeks to be released on the ground that there was a denial or infringement of his constitutional rights such that the judgment was void or voidable. *State v. Molina*, 279 Neb. 405, 778 N.W.2d 713 (2010); *State v. York*, 278 Neb. 306, 770 N.W.2d 614 (2009). Thus, in a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable. *State v. Gunther*, 278 Neb. 173, 768 N.W.2d 453 (2009); *State v. Jim*, 275 Neb. 481, 747 N.W.2d 410 (2008).

[5,6] A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution. *State v. Watkins*, 284 Neb. 742, 825 N.W.2d 403 (2012). If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing. *Id.*

[7,8] A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial. See *State v. Robinson*, 285 Neb. 394, 827 N.W.2d 292 (2013). To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. *State v. Robinson, supra*. A court may address the two prongs of this test, deficient performance and prejudice, in either order. *Id*.

[9,10] In addressing the "prejudice" component of the *Strickland* test, a court focuses on whether a trial counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. *State v. Robinson, supra*. To show prejudice under the prejudice component of the *Strickland* test, there must be a reasonable probability that but for the deficient performance, the result of the proceeding would have been different. *State v. Robinson, supra*. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*.

[11] Because Dragon's trial counsel was also his appellate counsel, this postconviction proceeding was his first opportunity to claim that his trial counsel provided ineffective assistance. See *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012).

Dragon makes two claims of ineffective assistance of counsel: (1) that counsel incorrectly advised him that he would not receive a life sentence if he entered a plea of guilty and (2) that counsel failed to present mitigating evidence during the sentencing phase. We conclude that the district court did not err when it rejected such claims without an evidentiary hearing.

As alleged in his postconviction motion, the first allegation appears to be a claim that trial counsel was deficient because he promised Dragon that Dragon would receive a number of years on the maximum end of his sentence instead of life imprisonment. The State suggests that even if trial counsel had promised a number of years at the top of the range, Dragon

suffered no prejudice, because his parole eligibility would be determined entirely by the low end of the range, in this case, 50 years. The State suggests that even if Dragon's allegation was correct, no hearing was necessary because ineffectiveness would not be established.

With regard to the alleged promise by counsel that Dragon would not receive a life imprisonment sentence if he entered a plea, the district court determined that, without regard to the State's argument noted above, the record refuted this claim. The district court noted that in response to questioning from the court at his plea hearing, Dragon acknowledged that he understood that he could receive a life imprisonment sentence and that no one had led him to believe he would receive a lesser sentence as a result of his plea. The court further noted that Dragon had unequivocally represented to the trial court that no promises had been made by anyone regarding his sentence. We agree with the district court's assessment of the record.

The record shows the following: The trial court asked Dragon, "Has anyone told you or led you to believe that if you entered a plea of guilt you would receive a light sentence or in any way [be] rewarded for so pleading?" Dragon responded, "No." The trial court then asked whether he understood that the court was "not bound by any recommendations as to sentencing by your attorney or the State." Dragon responded, "Yes, Your Honor." Upon our de novo review, we agree with the postconviction court's conclusion that the record, including the plea colloquy, refutes Dragon's claim that counsel promised him he would not receive a life imprisonment sentence.

We have previously held that when a defendant had unequivocally represented to the court at the plea hearing that no promises were made by anyone regarding the sentence to be imposed, the defendant was not entitled to an evidentiary hearing on his postconviction claim to the contrary. *State v. Vo*, 279 Neb. 964, 783 N.W.2d 416 (2010). We apply this reasoning to the instant case, and we conclude that the court did not err when it denied this claim without an evidentiary hearing.

With regard to the alleged failure to present mitigating evidence at sentencing, the district court noted that Dragon did not set forth any specific mitigating evidence that counsel failed to present. The court further stated that the record refuted Dragon's claim, because it showed that counsel had presented mitigating evidence, including letters of support, and counsel had argued to the court that it should consider mitigating factors when it imposed a sentence. We agree with the district court's assessment of Dragon's allegations and of the record.

In his petition, Dragon generally claims that counsel failed to conduct a minimal investigation of mitigating circumstances and in particular failed to interview family members who could have disclosed information regarding Dragon's troubled past. The record refutes this argument. We note that at Dragon's sentencing, counsel drew the court's attention to the letters of support, which included letters from members of Dragon's family. Counsel at the sentencing hearing urged the court to note a theme from the letters that Dragon was suffering from depression at the time he killed Moore. Such evidence and argument demonstrate that Dragon's family members were contacted to provide letters of support and that these family members were aware of the need to provide information regarding Dragon's mental state. We further note that in addition to the letters, one member of Dragon's family spoke in support of leniency at the sentencing.

At the sentencing hearing, counsel urged the court to consider Dragon's remorse and his act of taking responsibility for what he had done. Counsel also noted Dragon's lack of an extensive criminal history. Dragon fails to identify how any additional mitigating evidence would have resulted in a different sentence.

When pronouncing sentence, the sentencing court acknowledged that Dragon's making a plea and sparing the victim's family from going through a trial was a mitigating circumstance. The sentencing court stated, however, that it also considered the circumstances of this crime and of Dragon's prior conviction for assaulting another former girlfriend under similar circumstances.

Upon our de novo review of the record, we agree with the court's conclusion that the record refutes Dragon's claim that counsel failed to present mitigating evidence. We conclude that the district court did not err when it denied this claim without an evidentiary hearing.

CONCLUSION

We conclude the district court did not err when it determined that Dragon's motion for postconviction relief did not allege facts which constituted a denial of his constitutional rights and that as to certain matters, the record refuted his claims. The district court did not err when it denied Dragon's motion for postconviction relief without an evidentiary hearing.

AFFIRMED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, v. DOUGLAS D. PALIK, RESPONDENT.

842 N.W.2d 798

Filed February 21, 2014. No. S-13-1030.

Original action. Judgment of disbarment.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

PER CURIAM.

INTRODUCTION

This case is before the court on the voluntary surrender of license filed by Douglas D. Palik, respondent, on November 22, 2013. The court accepts respondent's voluntary surrender of his license and enters an order of disbarment.

STATEMENT OF FACTS

Respondent was admitted to the practice of law in the State of Nebraska on September 12, 1984. On September 21, 2012, respondent was suspended for a period of 1 year followed by a 1-year probationary term upon readmission because of

respondent's unprofessional handling of matters related to an estate. See *State ex rel. Counsel for Dis. v. Palik*, 284 Neb. 353, 820 N.W.2d 862 (2012). Respondent has not sought reinstatement of his license to practice law.

On November 22, 2013, respondent filed a voluntary surrender in which he stated that he is aware that after he was suspended on September 21, 2012, a new grievance was filed against him and an investigation was commenced by the Counsel for Discipline. In the voluntary surrender, respondent stated that he had commingled his personal funds with client funds in his client trust account and he described three instances over a period of 11 years in which he had mismanaged client funds in three different estates. In the voluntary surrender, respondent admitted that he violated his oath of office as an attorney and Neb. Ct. R. of Prof. Cond. §§ 3-501.3 and 3-501.15(d). Respondent further stated that he freely and voluntarily waived his right to notice, appearance, or hearing prior to the entry of an order of disbarment and consented to the entry of an order of disbarment.

ANALYSIS

Neb. Ct. R. § 3-315 of the disciplinary rules provides in pertinent part:

> (A) Once a Grievance, a Complaint, or a Formal Charge has been filed, suggested, or indicated against a member, the member may voluntarily surrender his or her license.
>
> (1) The voluntary surrender of license shall state in writing that the member knowingly admits or knowingly does not challenge or contest the truth of the suggested or indicated Grievance, Complaint, or Formal Charge and waives all proceedings against him or her in connection therewith.

Pursuant to § 3-315 of the disciplinary rules, we find that respondent has voluntarily surrendered his license to practice law and that respondent has waived all proceedings against him in connection therewith. We further find that respondent has consented to the entry of an order of disbarment.

CONCLUSION

Upon due consideration of the court file in this matter, the court finds that respondent has stated that he freely, knowingly, and voluntarily admits that he does not contest the allegations being made against him. The court accepts respondent's voluntary surrender of his license to practice law, finds that respondent should be disbarred, and hereby orders him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with all terms of Neb. Ct. R. § 3-316 of the disciplinary rules, and upon failure to do so, he shall be subject to punishment for contempt of this court. Accordingly, respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and Neb. Ct. R. §§ 3-310(P) (rev. 2014) and 3-323 of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF DISBARMENT.

BRIAN DAVID STEFFY, APPELLANT, V. RANDI JO STEFFY, NOW KNOWN AS RANDI JO STENSON, APPELLEE.

843 N.W.2d 655

Filed February 28, 2014. No. S-12-082.

1. **Rules of the Supreme Court: Appeal and Error.** Parties who wish to secure appellate review of their claims must abide by the rules of the Nebraska Supreme Court. Any party who fails to properly identify and present its claim does so at its own peril.
2. ____: ____. Neb. Ct. R. App. P. § 2-109(D)(1)(d), (e), and (f) (rev. 2008) requires a separate section for assignments of error, designated as such by a heading, and also requires that the section be located after a statement of the case and before a list of controlling propositions of law.
3. ____: ____. Assignments of error consisting of headings or subparts of the argument section do not comply with the mandate of Neb. Ct. R. App. P. § 2-109(D)(1)(e) (rev. 2008).
4. ____: ____. When a party fails to follow the rules of the Nebraska Supreme Court, an appellate court may proceed as though the party had failed to file a brief or, alternatively, may examine the proceedings for plain error.

5. **Appeal and Error.** The decision to proceed on plain error is at the discretion of the appellate court.
6. ____. Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
7. **Evidence: Appeal and Error.** Where credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
8. **Child Custody.** Child removal determinations are matters initially entrusted to the discretion of the trial judge, and the trial judge's determination is to be given deference.
9. ____. In order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. After clearing that threshold, the custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her.
10. **Child Custody: Visitation.** The purpose of requiring a legitimate reason for leaving the state in a motion to remove a minor child to another jurisdiction is to prevent the custodial parent from relocating the child because of an ulterior motive, such as frustrating the noncustodial parent's visitation rights.
11. **Child Custody.** In considering a motion to remove a minor child to another jurisdiction, the paramount consideration is whether the proposed move is in the best interests of the child.
12. ____. In determining the potential that the removal to another jurisdiction holds for enhancing the quality of life of the parent seeking removal and of the children, a court should consider the following factors: (1) the emotional, physical, and developmental needs of the children; (2) the children's opinion or preference as to where to live; (3) the extent to which the relocating parent's income or employment will be enhanced; (4) the degree to which housing or living conditions would be improved; (5) the existence of educational advantages; (6) the quality of the relationship between the children and each parent; (7) the strength of the children's ties to the present community and extended family there; and (8) the likelihood that allowing or denying the move would antagonize hostilities between the two parties. Depending on the circumstances of a particular case, any one factor or combination of factors may be variously weighted.
13. **Child Custody: Visitation.** The impact the move will have on contact between the child and the noncustodial parent must be viewed in light of the court's ability to devise reasonable visitation arrangements. A reasonable visitation schedule is one that provides a satisfactory basis for preserving and fostering a child's relationship with the noncustodial parent.

Petition for further review from the Court of Appeals, IRWIN, PIRTLE, and RIEDMANN, Judges, on appeal thereto from the District Court for Cass County, RANDALL L. REHMEIER, Judge.

Judgment of Court of Appeals reversed, and cause remanded with directions.

Karen S. Nelson and Liam K. Meehan, of Schirber & Wagner, L.L.P., for appellant.

Steven M. Delaney, Darin L. Whitmer, and A. Bree Swoboda, Senior Certified Law Student, of Reagan, Melton & Delaney, L.L.P., for appellee.

Heavican, C.J., Connolly, Stephan, McCormack, Miller-Lerman, and Cassel, JJ.

McCormack, J.

NATURE OF CASE

This case is before us on further review of the decision of the Nebraska Court of Appeals.[1] Brian David Steffy has primary custody of his son, Jakob Steffy, pursuant to a divorce decree entered in the Cass County District Court. Brian requested permission from the district court to remove Jakob from the State of Nebraska and move to the State of Texas. Jakob's mother, Randi Jo Steffy, now known as Randi Jo Stenson, resisted. After a bench trial, the district court denied the request, finding that Brian had failed to meet his burden to show that he had a legitimate reason to relocate and that the relocation was in the best interests of Jakob. Brian appealed. His appellate brief failed to properly set forth assignments of error, but the Court of Appeals found plain error and reversed the district court's decision on removal.[2] We granted Randi's petition for further review, and we reverse the decision of the Court of Appeals.

BACKGROUND

Brian and Randi were married, and Jakob was born in August 2001. In 2003, Brian, Randi, and Jakob relocated to Plattsmouth, Nebraska, when Randi, who is on active duty military status in the U.S. Army, was assigned to Offutt Air

[1] *Steffy v. Steffy*, 20 Neb. App. 757, 832 N.W.2d 895 (2013).

[2] *Id.*

Force Base in Bellevue, Nebraska. Neither Randi nor Brian had immediate family in Nebraska.

In April 2008, the district court entered a decree of dissolution for Brian and Randi's marriage. The district court granted legal custody of Jakob to Brian with reasonable rights of visitation for Randi. Randi was ordered to pay child support.

Jakob lives in Brian's house in Plattsmouth. Brian also served in the military, and after retiring, Brian received a degree from Creighton University in elementary education and has his teaching certification for the State of Nebraska. Brian works as a substitute teacher for Bellevue Public Schools, earning between $125 and $140 per day. Brian has applied but has been unable to gain employment as a full-time teacher.

In April 2011, Brian married Sheri Steffy. Sheri and her children moved in with Brian and Jakob. Sheri is a certified teacher in the State of Nebraska and is a full-time first grade teacher for Bellevue Public Schools. Sheri is originally from Oklahoma.

Every other weekend and during the summer and holidays, Randi is granted visitation time with Jakob. At the time of the divorce, Randi was stationed in Fort Leavenworth, Kansas. Randi was then transferred to Fort Knox, Kentucky, when she voluntarily took a position as a colonel in the U.S. Army. When Randi exercises her rights of weekend visitation with Jakob, she flies by plane into Kansas City, Missouri, and picks Jakob up from Brian in Rock Port, Missouri. Randi and Jakob then stay with Randi's sister in Missouri. During extended breaks, Jakob will travel to Fort Knox to stay with Randi.

Jakob has an autism spectrum disorder. The disorder is a spectrum of related disabilities that are marked by communication difficulties, stereotypic behavior, and social difficulties.

To overcome his learning difficulties, Jakob receives an individualized education plan (IEP) at school. As part of this plan, Jakob receives a combination of general education, special education, and therapeutic work. This includes 12 to 15 hours a week of Applied Behavior Analysis (ABA) therapy. The purpose of ABA therapy is to change Jakob's behaviors by increasing appropriate behaviors and by decreasing the inappropriate behaviors. By all accounts, Jakob has progressed

"wonderfully" under the Plattsmouth School District's IEP for him. In order to maintain progress, similar services and therapies need to continue throughout his schooling.

In December 2010, Brian filed a complaint to modify the decree of dissolution of marriage and the parenting plan. In the complaint, Brian requested sole legal care, custody, and control of Jakob; an increase in child support; and to be allowed to remove Jakob from the State of Nebraska to the State of Texas. Randi resisted the move.

On August 25, 2011, a bench trial was held. Brian's first witness was Keery Wolf. Wolf is a board-certified behavioral analyst with a master's degree in early childhood special education. Her company, Wolf Behavioral Consulting, provided services to children with autism and other related disabilities. Wolf was the supervisor for Jakob's applied behavior analysis program at school.

At the time of trial, Wolf had contracted Jakob's services out to another company started by a former employee. Wolf is the only board-certified behavioral analyst that works with autistic children in schools in the eastern Nebraska area, and Wolf Behavioral Consulting was moving in a direction that would end those services. However, she testified that her former employee was working toward her board certification to take over those services.

Wolf testified that based on her research, there are more ABA services available to Jakob in Texas than in Nebraska. She testified that the ABA services do not need to be through the same provider but that the quality of services needs to be maintained. Wolf testified that Jakob's ABA needs could be met by the services provided in Texas.

Sheri testified that she and Brian wanted to move the family to the Dallas-Fort Worth area in Texas for better career opportunities. She testified that she has begun the job search process in Texas, but had not yet applied for a position. She believed it would be premature to apply for jobs if they did not have permission to remove Jakob from the State of Nebraska.

Brian testified that he wants to move to Texas because Texas offers better economic opportunities for his family and better ABA services for Jakob. Brian also has family in Texas. He

testified that if the move was allowed, he would continue to accommodate Randi's visitation rights because he understood the importance of Jakob's relationship with his mother.

Brian testified that the pay scale for teaching jobs was greater in Texas than in Nebraska. An exhibit was admitted containing the starting salary information for teachers with a bachelor's degree and no experience at the Coppell School District, Carrollton-Farmers School District, and the Irving Independent School District in the Dallas-Fort Worth area. The average pay for a new teacher is approximately $47,000 a year. In comparison, Brian testified that he was earning $125 to $140 per day and that if hired as a full-time teacher, he would be salaried at approximately $31,000 at Omaha, Bellevue, Plattsmouth, and Papillion, Nebraska, public schools.

Brian testified that he has researched the schools and services that are provided in Texas and compared them to Jakob's current school and services. Brian and Jakob have visited businesses offering ABA therapy in Texas. Brian testified there are a plethora of businesses offering ABA services. It is Brian's opinion that the academic, behavior, and therapeutic services are far superior in Texas than in Nebraska. Due to Wolf's changing her business model, Brian is also concerned about the continued availability of ABA services for Jakob in Nebraska.

Randi testified that she wants to diligently protect her visitation rights and that she does not want Jakob to be removed from Nebraska. She testified that it is her plan to move back to eastern Nebraska after she retires in 2 years from the Army. She conceded that if she were to receive another favorable assignment from the military, she may not retire.

Randi is concerned about Jakob's leaving Nebraska, because it may harm his development. She also expressed that she is worried that she will no longer be able to take Jakob to her sister's home in Missouri. If visiting Jakob in Texas, she would have to exercise her visitation in a hotel room and she is concerned that Jakob would be uncomfortable. She fears that such visitations may harm her relationship with Jakob.

The court also received the depositions of Jakob's teachers in Plattsmouth. The teachers generally described the learning

difficulties Jakob faces and the IEP that has been implemented for him. They praised Brian for his involvement in Jakob's education and development. In general, the teachers testified that although change is difficult for Jakob, change is inevitable as he moves from grade school to middle school.

In its modification order, the district court increased the child support obligations of Randi, but denied Brian's request for sole legal custody and his request to remove Jakob from the State of Nebraska to the State of Texas. On the issue of removal, the district court found that Brian did not meet his burden in establishing the threshold question of whether he had a legitimate reason to move to Texas.

The district court also found that the move was not in the best interests of Jakob, because the move would not enhance the quality of Jakob's life. The district court stressed that Brian's and Sheri's employment opportunities in Texas were speculative. It found that there was no guarantee that a job would be obtained or that such job would pay a higher salary. The district court further found that Jakob's therapeutic and developmental needs were being met in Plattsmouth and that the evidence did not establish superior therapeutic and developmental services in Texas.

Furthermore, the district court noted that the move could be difficult for Jakob and that the move threatened to antagonize Randi and Brian's relationship. The district court also indicated that the move could affect Randi's visitation with Jakob. After finding that Jakob's quality of life would not be enhanced and finding that the move could affect Randi's visitation, the district court denied removal because it was not in the best interests of Jakob. Brian appealed the order.

The Court of Appeals found that Brian's appellate brief did not comply with Neb. Ct. R. App. P. § 2-109(D)(1) (rev. 2008).[3] The Court of Appeals, under a plain error standard of review, reevaluated all the evidence of the record and concluded that the district court had plainly erred in its determinations that Brian did not have a legitimate reason and that the move to Texas was not in Jakob's best interests. Specifically,

[3] *Id.*

in its best interests analysis, the Court of Appeals found that Brian and Randi were not motivated by an effort to frustrate or manipulate each other, that the move would increase Jakob's quality of life, and that the move would not greatly impact Jakob's relationship with Randi.

Finding that there was a legitimate reason for removal and that the removal was in Jakob's best interests, the Court of Appeals held that the district court's decision deprived Brian of a just result and was, therefore, plain error. The Court of Appeals reversed the district court's decision on the removal issue and affirmed on all other grounds. We granted Randi's petition for further review.

ASSIGNMENTS OF ERROR

In her petition for review, Randi assigns that the Court of Appeals erred in (1) applying the plain error standard, (2) reweighing all of the evidence, and (3) reversing the decision of the district court in regard to removal of Jakob from the State of Nebraska.

STANDARD OF REVIEW

[1] Parties who wish to secure appellate review of their claims must abide by the rules of the Nebraska Supreme Court.[4] Any party who fails to properly identify and present its claim does so at its own peril.[5]

[2,3] Brian's appellate brief to the Court of Appeals lists its assignments of error under the argument section instead of under a separate heading. Section 2-109(D)(1)(d), (e), and (f) requires a separate section for assignments of error, designated as such by a heading, and also requires that the section be located after a statement of the case and before a list of controlling propositions of law. We have previously held that assignments of error consisting of headings or subparts of the argument section do not comply with the mandate of § 2-109(D)(1)(e).[6]

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[4] *In re Guardianship & Conservatorship of Larson*, 270 Neb. 837, 708 N.W.2d 262 (2006).

[5] *Id.*

[6] *In re Interest of Jamyia M.*, 281 Neb. 964, 800 N.W.2d 259 (2011).

[4,5] In this situation, an appellate court may proceed as though Brian had failed to file a brief or, alternatively, may examine the proceedings for plain error.[7] The decision to proceed on plain error is at the discretion of the appellate court.[8]

[6] As did the Court of Appeals, we choose to review the record for plain error. Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.[9]

[7] Where credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.[10]

ANALYSIS

[8] In parental relocation cases, trial and appellate courts deal with the tension created by a mobile society and the problems associated with uprooting children from stable environments.[11] Courts are required to balance the noncustodial parent's desire to maintain their current involvement in the child's life with the custodial parent's chance to embark on a new or better life.[12] These issues are among the most difficult issues that courts face in postdivorce proceedings.[13] It is for this reason that such determinations are matters initially entrusted to the discretion of the trial judge, and the trial judge's determination is to be given deference.[14]

[9] In order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the

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[7] *Id.*

[8] See *Connelly v. City of Omaha*, 284 Neb. 131, 816 N.W.2d 742 (2012).

[9] *Id.*; *Cesar C. v. Alicia L.*, 281 Neb. 979, 800 N.W.2d 249 (2011); *In re Interest of Jamyia M.*, *supra* note 6.

[10] *Caniglia v. Caniglia*, 285 Neb. 930, 830 N.W.2d 207 (2013).

[11] *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999).

[12] *Id.*

[13] *Id.*

[14] *Id.*

state.[15] After clearing that threshold, the custodial parent must also demonstrate that it is in the child's best interests to continue living with him or her in the new location.[16]

[10] The purpose of requiring a legitimate reason is to prevent the custodial parent from relocating the child because of an ulterior motive, such as frustrating the noncustodial parent's visitation rights.[17] Absent such aggravating circumstances, we have repeatedly held that significant career enrichment is a legitimate reason for relocation in and of itself.[18]

[11] But the best interests of the child are paramount.[19] To determine whether removal to another jurisdiction is in the child's best interests, the trial court evaluates three considerations.[20]

The first consideration is each parent's motive for seeking or opposing the move.[21] The ultimate question for this consideration is whether either party has elected or resisted a removal in an effort to frustrate or manipulate the other party.[22]

[12] The second consideration is the potential that the move holds for enhancing the quality of life for the child and the custodial parent.[23] To determine quality of life, a court should consider the following factors: (1) the emotional, physical, and developmental needs of the children; (2) the children's opinion or preference as to where to live; (3) the extent to which the relocating parent's income or employment will be enhanced; (4) the degree to which housing or living conditions would be improved; (5) the existence of educational

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[15] *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000).

[16] *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002).

[17] *Farnsworth v. Farnsworth*, *supra* note 11.

[18] See, *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002); *Kalkowski v. Kalkowski*, *supra* note 15; *Farnsworth v. Farnsworth*, *supra* note 11.

[19] *Vogel v. Vogel*, *supra* note 16.

[20] *McLaughlin v. McLaughlin*, *supra* note 18.

[21] See *id.*

[22] *Id.*

[23] *Id.*

advantages; (6) the quality of the relationship between the children and each parent; (7) the strength of the children's ties to the present community and extended family there; and (8) the likelihood that allowing or denying the move would antagonize hostilities between the two parties.[24] Depending on the circumstances of a particular case, any one factor or combination of factors may be variously weighted.[25]

[13] The final consideration in the best interests analysis is the impact such a move will have on contact between the child and the noncustodial parent.[26] This effect must be viewed in light of the court's ability to devise a reasonable visitation arrangement that provides a satisfactory basis for preserving and fostering a child's relationship with the noncustodial parent.[27] The determination of reasonableness is to be made on a case-by-case basis.[28]

Here, we will not address the threshold question of whether Brian had a legitimate reason to relocate because our holding on best interests is dispositive. After reviewing the record, we hold that the district court did not plainly err in its determination that the move was not in Jakob's best interests.[29] Because the move was not in Jakob's best interests, Brian's motion to remove Jakob from Nebraska was properly denied.

The record supports the district court's finding that Brian had failed to prove that the move would enhance Jakob's quality of life. By all accounts, Jakob has progressed "wonderfully" with the ABA services and educational opportunities offered in Plattsmouth. Both Brian and Sheri have employment in Nebraska, and their income is sufficient to support their family. There is evidence that moving to Texas may harm Jakob's progress and that change can be very difficult for a child with autism. The district court also made a finding that

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[24] *Id.*

[25] See *id.*

[26] *Id.*

[27] *Vogel v. Vogel*, *supra* note 16.

[28] *Id.*

[29] See *McLaughlin v. McLaughlin*, *supra* note 18.

the move would antagonize Brian and Randi's relationship. We must give weight to these findings of fact.[30]

The record also indicates that the move could harm Randi's relationship with Jakob. Randi testified that the relocation could preclude her from visiting with Jakob at her sister's home in Missouri. If visitation with Jakob took place in Texas, Randi would have to take Jakob to a hotel room instead of her sister's home where Jakob was comfortable. Additionally, Randi testified that she is planning on returning to Nebraska after her retirement from the Army, which was to occur 2 years from trial. If Jakob was removed from the State of Nebraska, she would lose the opportunity to more frequently visit with him after her retirement.

Although Brian testified that he is willing to accommodate Randi's visitation rights, the record indicates that the move will nevertheless have some effect on Randi's established visitation schedule and that it could have a more significant effect after her retirement.

From these findings, we conclude that the district court did not commit plain error in denying Brian's request to remove Jakob from the State of Nebraska. Both quality of life and impact on the noncustodial parent weigh against relocation, while the motives of each party are equally balanced. It is not our role as an appellate court under a plain error standard of review to substitute our opinion for an opinion of a district court that is reasonably supported by the record. Furthermore, we cannot conclude from the record that the factual findings of the district court were so unsubstantiated that any purported errors were injurious to the integrity, reputation, or fairness of the judicial process as to justify reversal on appeal under the plain error doctrine.

CONCLUSION

The district court did not plainly err in determining that Brian failed to prove that moving from Nebraska to Texas was in Jakob's best interests. Therefore, we reverse the decision of the Court of Appeals and remand the cause to the Court of

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[30] See *Caniglia v. Caniglia*, *supra* note 10.

Appeals with directions to reinstate the judgment of the district court as it pertains to Brian's request to remove Jakob from the State of Nebraska.

REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., participating on briefs.

EDWIN H. KUHNEL, APPELLANT,
v. BNSF RAILWAY COMPANY,
A CORPORATION, APPELLEE.

844 N.W.2d 251

Filed February 28, 2014. No. S-12-296.

1. **Jury Instructions: Appeal and Error.** Whether a jury instruction is correct is a question of law, which an appellate court independently decides.
2. **Federal Acts: Railroads: Claims: Courts.** In disposing of a claim controlled by the Federal Employers' Liability Act, a state court may use procedural rules applicable to civil actions in the state court unless otherwise directed by the act, but substantive issues concerning a claim under the act are determined by the provisions of the act and interpretive decisions of the federal courts construing the act.
3. **Jury Instructions: Appeal and Error.** Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error.
4. **Appeal and Error: Words and Phrases.** Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
5. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and SIEVERS and RIEDMANN, Judges, on appeal thereto from the District Court for Scotts Bluff County, RANDALL L. LIPPSTREU, Judge. Judgment of Court of Appeals reversed.

Michael J. Wilson, of Schaefer Shapiro, L.L.P., and James L. Cox, of Brent Coon & Associates, for appellant.

Nichole S. Bogen and Thomas C. Sattler, of Sattler & Bogen, L.L.P., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

CASSEL, J.

INTRODUCTION

An injured railroad employee brought this action under the Federal Employers' Liability Act (FELA).[1] Pursuant to the jury's general verdict, the district court entered judgment for the employer. On appeal, the Nebraska Court of Appeals found plain error in the jury instructions regarding the employer's duty to provide a reasonably safe place to work.[2] The Court of Appeals also rejected the employer's argument that the general verdict rule precluded the court from overturning the jury's verdict. Upon further review, we conclude that the jury instructions in this case do not rise to the level of plain error. Thus, we do not reach the general verdict rule issue, and we reverse the Court of Appeals' decision.

BACKGROUND

Edwin H. Kuhnel was an employee of BNSF Railway Company (BNSF) and alleged that he was injured when he was thrown against a locomotive cab seat during the recoupling of train cars. Kuhnel filed a complaint against BNSF pursuant to FELA in July 2009. In his complaint, he claimed that his injuries were caused by BNSF's failure to provide him with a reasonably safe place to work and to take other appropriate safety measures.

A jury trial was held, and both Kuhnel and BNSF submitted proposed instructions at the jury instruction conference. Kuhnel's proposed instructions charged the jury that FELA imposed a duty upon BNSF to provide him with a reasonably safe place to work. Kuhnel's tendered instruction No. 2 provided, in pertinent part:

> At the time and place in question, [BNSF] had a continuing duty as an employer to use ordinary care under

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[1] 45 U.S.C. § 51 et seq. (2006).

[2] *Kuhnel v. BNSF Railway Co.*, 20 Neb. App. 884, 834 N.W.2d 803 (2013).

> the circumstances in furnishing [Kuhnel] with a reasonably safe place in which to work. It was also [BNSF's] continuing duty to use ordinary care under the circumstances to maintain and keep such place of work in a reasonably safe condition.

The district court rejected both parties' proposed jury instructions at the conference and adopted its own instructions. The court's jury instructions did not include an instruction that FELA imposed a duty upon BNSF to provide a reasonably safe place to work. Instead, the instructions merely repeated Kuhnel's allegation that BNSF was negligent in failing to fulfill this duty. The court's instruction No. 2 provided, in pertinent part:

> **INSTRUCTION NO. 2**
> **I. CLAIMS OF THE PARTIES**
> ***A. Plaintiff's Complaint***
>
> . . . .
>
> . . . Kuhnel further claims that his injuries were caused, in whole or in part, by BNSF's negligence, as follows:
>
> a. Failing to provide Kuhnel with a reasonably safe place to work[.]

The district court's jury instruction on Kuhnel's burden of proof provided:

> ***A. Plaintiff's Burden of Proof (Negligence)***
>
> Before Kuhnel can recover against BNSF he must prove, by the greater weight of the evidence, all of the following:
>
> 1. That at the time of the alleged accident Kuhnel was working in the course and scope of his employment by BNSF; and
>
> 2. That BNSF was negligent in one or more of the ways claimed by Kuhnel; and
>
> 3. That BNSF's negligence was a cause, in whole or in part, [of] some damage to Kuhnel; and
>
> 4. The nature and extent of Kuhnel's damages.

The district court gave the parties multiple opportunities to make objections to its instructions at the jury instruction conference and indicated that it was interested in the parties' "having

an opportunity to make an objection of record." Kuhnel raised several objections to the instructions on other grounds, but made no objection on the basis that the instructions did not charge the jury that FELA imposed a duty upon BNSF to provide a reasonably safe place to work.

The jury returned a general verdict in BNSF's favor. It used the district court's verdict form No. 1, which stated its finding that Kuhnel had not met his burden of proof. Kuhnel moved the district court for a new trial, claiming that the court's jury instructions caused him prejudice by failing to instruct the jury on BNSF's duty of care. The district court overruled Kuhnel's motion, finding that its instructions "included the substance of Kuhnel's requested instruction regarding BNSF's duty to provide a reasonably safe place to work."

Kuhnel appealed to the Court of Appeals, which found that the district court's jury instructions constituted plain error. According to the Court of Appeals, the instructions erroneously permitted the jury to decide, as a factual determination, whether BNSF was under a duty to provide a reasonably safe place to work.[3] The Court of Appeals further found that the general verdict rule did not bar it from overturning the jury's verdict. It then reversed the judgment of the district court and remanded the cause for a new trial.

BNSF petitioned for further review, which we granted.

ASSIGNMENTS OF ERROR

BNSF assigns that the Court of Appeals erred in (1) holding that a trial court must separately instruct the jury on the employer's duty to provide a reasonably safe place to work in a FELA case and that the failure to provide such an instruction constitutes plain error, (2) holding that the district court failed to properly instruct the jury, (3) failing to find that Kuhnel's lack of a proper objection precluded his appeal, and (4) failing to apply the general verdict rule to the jury's verdict.

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[3] *Id.*

STANDARD OF REVIEW

[1] Whether a jury instruction is correct is a question of law, which an appellate court independently decides.[4]

ANALYSIS

[2] We begin our analysis by acknowledging that in disposing of a claim controlled by FELA, a state court may use procedural rules applicable to civil actions in the state court unless otherwise directed by the act, but substantive issues concerning a claim under FELA are determined by the provisions of the act and interpretive decisions of the federal courts construing FELA.[5]

We first address the Court of Appeals' conclusions regarding the jury instructions given by the district court. Because our analysis of the instructions is dispositive, we do not reach BNSF's assignment of error as to the application of the general verdict rule.

Separate Duty of Care Instruction

BNSF assigns that the Court of Appeals erred in holding that a trial court must provide a separate instruction on the employer's duty to provide a reasonably safe place to work in a FELA case and that the failure to do so is plain error. We find that this assignment of error misconstrues the Court of Appeals' holding.

We do not read the Court of Appeals' holding as requiring a separate duty of care instruction in a FELA case. The Court of Appeals found that the district court's jury instructions were plainly erroneous after "[h]aving viewed the jury instructions given as a whole."[6] Thus, we conclude that it was the district court's failure to include any instruction on BNSF's duty of care that the Court of Appeals found to be plainly erroneous,

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[4] *Credit Bureau Servs. v. Experian Info. Solutions*, 285 Neb. 526, 828 N.W.2d 147 (2013).

[5] *Ballard v. Union Pacific RR. Co.*, 279 Neb. 638, 781 N.W.2d 47 (2010).

[6] *Kuhnel*, *supra* note 2, 20 Neb. App. at 894, 834 N.W.2d at 811.

not the failure to provide a separate instruction on the issue. We therefore reject BNSF's first assignment of error as being without merit.

Instruction on BNSF's Duty of Care

In its second and third assignments of error, BNSF asserts that the Court of Appeals erred in finding that the district court's jury instructions constituted plain error for failing to instruct the jury on BNSF's duty of care under FELA. The Court of Appeals concluded that the district court's jury instructions constituted plain error because they turned BNSF's duty of care into a threshold question of fact for the jury. We disagree.

[3,4] Kuhnel failed to make an objection to the district court's jury instructions on the ground that they failed to instruct the jury on BNSF's duty of care under FELA. We have stated that failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error.[7] Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.[8] Thus, in the absence of plain error, there is no ground for reversal of the jury verdict.

The district court's jury instructions adequately informed the jury of BNSF's duty to provide Kuhnel with a reasonably safe place to work. Contrary to the Court of Appeals' conclusion, we agree with the district court that its instructions included the substance of Kuhnel's requested instruction on BNSF's duty of care. The burden of proof instruction stated Kuhnel's burden of proving that BNSF was negligent in one or more of the ways he had alleged. And instruction No. 2 provided that one claim of negligence was BNSF's failure to provide

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[7] *Russell v. Stricker*, 262 Neb. 853, 635 N.W.2d 734 (2001).

[8] *Id.*

him with a reasonably safe place to work. In order to find that BNSF was negligent in this way, the instructions required the jury to determine only that BNSF had failed to provide Kuhnel with a reasonably safe place to work. The jury was not directed to determine whether such a duty existed. Thus, although not explicitly stated, the instructions recognized BNSF's duty of care under FELA and did not turn BNSF's duty of care into a threshold question of fact.

We therefore conclude that the jury instructions do not rise to the level of plain error. As we have already noted, plain error is an error of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. Although not perfect, the substance of the jury instructions adequately informed the jury as to the law of the case. We recognize that trial judges are under a duty to correctly instruct on the law without any request to do so.[9] And we acknowledge that a railroad's duty to use reasonable care in providing a safe place to work has become an integral part of FELA.[10] But we are not persuaded that the district court's instructions have resulted in a miscarriage of justice or resulted in damage to the integrity, reputation, and fairness of the judicial process. Consequently, the Court of Appeals erred in finding that plain error existed.

BNSF's Remaining Assignment of Error

[5] Because we find that the district court's jury instructions do not rise to the level of plain error, we need not consider BNSF's remaining assignment of error. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[11] Consequently, we do not address whether the Court of Appeals was correct

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[9] See, e.g., *Russell, supra* note 7.

[10] See *Ragsdell v. Southern Pacific Transp. Co.*, 688 F.2d 1281 (9th Cir. 1982).

[11] *Holdsworth v. Greenwood Farmers Co-op*, 286 Neb. 49, 835 N.W.2d 30 (2013).

in concluding that the general verdict rule did not bar it from overturning the jury's verdict.

CONCLUSION

Although the district court's instructions did not explicitly charge the jury on BNSF's duty of care, they implicitly recognized BNSF's duty by requiring the jury to find that BNSF was negligent if it found that BNSF had failed to provide Kuhnel with a reasonably safe place to work. We therefore find that the Court of Appeals erred in concluding that the instructions constituted plain error. Because our finding that the instructions were not plainly erroneous is dispositive, we need not analyze BNSF's remaining assignment of error. We reverse the decision of the Court of Appeals.

REVERSED.

VICTORIA A. WISNIEWSKI, APPELLANT, V. HEARTLAND TOWING, INC., ET AL., DEFENDANTS AND THIRD-PARTY PLAINTIFFS, APPELLEES, AND LYMAN-RICHEY CORPORATION, DOING BUSINESS AS READY MIXED CONCRETE COMPANY, A DELAWARE CORPORATION, ET AL., THIRD-PARTY DEFENDANTS, APPELLEES.

844 N.W.2d 48

Filed February 28, 2014. No. S-13-171.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's decision.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Order vacated, and appeal dismissed.

Robert S. Sherrets and James D. Sherrets, of Sherrets, Bruno & Vogt, L.L.C., for appellant.

Christopher P. Welsh, of Welsh & Welsh, P.C., L.L.O., pro se.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and CASSEL, JJ.

HEAVICAN, C.J.

INTRODUCTION

Christopher P. Welsh of Welsh & Welsh, P.C., L.L.O., represented appellant Veronica A. Wisniewski in a negligence suit against Heartland Towing, Inc. After judgment was entered against Heartland Towing, Welsh orally motioned to be paid attorney fees and costs from the judgment. The district court granted the motion. Wisniewski appeals. We dismiss.

BACKGROUND

Wisniewski was injured in a multiple vehicle accident on June 9, 2006. Wisniewski braked to avoid hitting another vehicle and was struck from behind by a tow truck operated by Billy Pipkin and owned by Heartland Towing. On June 5, 2007, Wisniewski retained Welsh to represent her in a lawsuit against Pipkin and Heartland Towing. Wisniewski and Welsh entered into a contingency fee contract. After a jury trial, the court entered a judgment of $35,006.23 in favor of Wisniewski on June 6, 2012.

On October 12, 2012, Wisniewski, represented by new counsel, filed a legal malpractice suit against Welsh alleging that Welsh failed to adequately represent Wisniewski's claims arising out of the June 2006 automobile accident.

On January 23, 2013, Welsh made an oral motion for payment of attorney fees and costs in this, the underlying negligence lawsuit. The district court granted the motion and authorized the clerk of the district court to distribute $11,085.29 in attorney fees and $3,311.55 in costs to Welsh from the judgment.

Wisniewski filed a motion to alter or amend the order. The district court denied the motion and set a supersedeas bond. Wisniewski appeals from the order denying her motion to alter or amend. Welsh responds as "Movant-Appellee."

ASSIGNMENTS OF ERROR

Wisniewski assigns the following errors of the district court: (1) finding it had jurisdiction to hear Welsh's motion, (2) granting Welsh's motion without an evidentiary hearing, (3) finding Welsh was entitled to attorney fees, and

(4) denying Wisniewski's motion to alter or amend and stay proceedings.

STANDARD OF REVIEW

[1] When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's decision.[1]

ANALYSIS

In her first assignment of error, Wisniewski asserts that the district court erred in finding it had jurisdiction to hear Welsh's motion for attorney fees and costs.

Wisniewski argues that the motion was an effort to enforce a contract and that, as such, Welsh was required to file a separate lawsuit against Wisniewski. We reject this argument.

Neb. Rev. Stat. § 7-108 (Reissue 2012) states:

> An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment; and upon money in his hands belonging to his client, and in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party.

We have repeatedly stated an attorney may file a petition in intervention in the original action to enforce an attorney's lien.[2]

Recently, in *Meister v. Meister*,[3] we reiterated that intervention is the proper method of enforcing an attorney's lien in the original action and explained that equity excuses the usual requirement of intervening before trial as required by Neb. Rev. Stat. § 25-328 (Reissue 2008). We also noted in *Meister* that an attorney's failure to intervene before arguing his lien did not destroy the attorney's entitlement to the lien.[4]

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[1] See *Holste v. Burlington Northern RR. Co.*, 256 Neb. 713, 592 N.W.2d 894 (1999).

[2] See, e.g., *Barber v. Barber*, 207 Neb. 101, 296 N.W.2d 463 (1980).

[3] *Meister v. Meister*, 274 Neb. 705, 742 N.W.2d 746 (2007).

[4] *Id.*

In this case, Welsh never filed a petition in intervention. Although Welsh claims to have filed the equivalent in a written motion, no such motion appears in the record before this court. At the time of his oral motion, Welsh was not a party to the suit. Furthermore, Welsh stated at the hearing that he no longer represented Wisniewski. Lacking subject matter jurisdiction, the court erred in deciding Welsh's oral motion for payment. We have stated that a ruling made in the absence of subject matter jurisdiction is a nullity.[5] We therefore vacate the district court's order granting Welsh's oral motion and dismiss the appeal.

ORDER VACATED, AND APPEAL DISMISSED.

MILLER-LERMAN, J., participating on briefs.

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[5] *Spady v. Spady*, 284 Neb. 885, 824 N.W.2d 366 (2012); *Hunt v. Trackwell*, 262 Neb. 688, 635 N.W.2d 106 (2001); *In re Estate of Andersen*, 253 Neb. 748, 572 N.W.2d 93 (1998); *Billups v. Scott*, 253 Neb. 287, 571 N.W.2d 603 (1997).

JASON M. BRUNO, APPELLANT, V. METROPOLITAN UTILITIES DISTRICT ET AL., APPELLEES, AND NORTHERN NATURAL GAS COMPANY, INTERVENOR-APPELLEE.

844 N.W.2d 50

Filed February 28, 2014. No. S-13-212.

1. **Motions to Dismiss: Appeal and Error.** A district court's grant of a motion to dismiss is reviewed de novo.
2. **Motions to Dismiss: Pleadings: Appeal and Error.** When reviewing an order dismissing a complaint, the appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusion.
3. **Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
4. **Contracts: Legislature.** Competitive bids and public letting are unquestionably a matter of legislative prerogative.
5. **Statutes: Appeal and Error.** The language of a statute is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.

6. **Statutes.** If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.
7. ____. Where general and special provisions of statutes are in conflict, the general law yields to the special.
8. **Statutes: Appeal and Error.** An appellate court will not read into a statute a meaning that is not there.
9. **Motions to Dismiss: Pleadings.** To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face. In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.

Appeal from the District Court for Douglas County: TIMOTHY P. BURNS, Judge. Affirmed.

James D. Sherrets, Robert S. Sherrets, and Diana J. Vogt, of Sherrets, Bruno & Vogt, L.L.C., for appellant.

Ronald E. Bucher for appellees Metropolitan Utilities District et al.

Gregory C. Scaglione and Minja Herian, of Koley Jessen, P.C., L.L.O., and Greg Porter and James R. Talcott for intervenor-appellee Northern Natural Gas Company.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and CASSEL, JJ.

STEPHAN, J.

The issue presented in this appeal is whether Nebraska law requires a metropolitan utilities district to seek competitive bids before entering into a contract with another entity to provide interstate natural gas transportation services. The district court for Douglas County determined that there was no such requirement. We agree, and therefore affirm.

BACKGROUND

Metropolitan Utilities District (M.U.D.) is a political subdivision which distributes water and natural gas to residents and businesses in the Omaha metropolitan area.[1] It was established

[1] Neb. Rev. Stat. § 14-101 and § 14-2101 (Reissue 2012).

and is governed by Nebraska law.[2] M.U.D. contracts with Northern Natural Gas Company (Northern) for natural gas pipeline transportation services to bring natural gas to the Omaha metropolitan area.

On November 7, 2012, M.U.D. and Northern entered into a contract with an effective date of January 1, 2013. This contract was an amendment to a preexisting contract between M.U.D. and Northern. The new contract provided that Northern would provide interstate natural gas transportation service to M.U.D. for 20 years for an amount in excess of $300 million.

Jason M. Bruno, a ratepayer and taxpayer in Omaha, obtains services for gas, water, and sewer from M.U.D. He filed a complaint against M.U.D. and its board members seeking a declaratory judgment that the 2012 amendment to the contract between M.U.D. and Northern be found void or voidable, terminated, or in the alternative, equitably adjusted. He also asked that M.U.D. be required to bid for all work in accordance with state law. Bruno alleged that M.U.D. failed to seek bids for the contract in violation of statutory and common law requirements. Specifically, he alleged that § 14-2121 requires M.U.D. to seek bids for all contracts for work not performed by M.U.D. employees. He also alleged that the contract resulted in M.U.D.'s paying more than if the contract had been let for bid, thus causing increased rates for ratepayers and taxpayers.

Northern was granted leave to intervene, and both Northern and M.U.D. filed motions to dismiss, to strike, and of misjoinder. The district court determined that the plain language of § 14-2121 does not require mandatory bidding; rather, it grants M.U.D. discretionary authority to decide whether to seek bids for its contracted projects. In addition, the court determined that § 14-2125 expressly allowed M.U.D. to contract with other companies operating gas distribution systems for the transportation, purchase, sale, or exchange of available gas supplies with no requirement that such contracts or agreements must be let for bidding. The district court concluded Nebraska

[2] Neb. Rev. Stat. §§ 14-2101 to 14-2157 (Reissue 2012 & Supp. 2013).

law does not require or mandate that M.U.D. seek bids for the contract it entered into with Northern for natural gas pipeline services, sustained the motions to dismiss, and dismissed Bruno's complaint.

ASSIGNMENTS OF ERROR

On appeal, Bruno assigns the district court erred in (1) determining that M.U.D. was not statutorily required to seek bids for all contracts not performed by M.U.D. employees, (2) interpreting § 14-2125(1) in isolation rather than as part of a statutory scheme, (3) failing to find that strong public policy requires competitive bidding, (4) failing to address all of his claims, and (5) dismissing the complaint.

STANDARD OF REVIEW

[1,2] A district court's grant of a motion to dismiss is reviewed de novo.[3] When reviewing an order dismissing a complaint, the appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusion.[4]

[3] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.[5]

ANALYSIS

M.U.D. was created by the Legislature, and the Legislature has plenary power over M.U.D.[6] The Legislature exercised this power by enacting §§ 14-2101 to 14-2157. M.U.D. is governed by an elected board of directors[7] which has "general charge,

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[3] *Estate of Teague v. Crossroads Co-op Assn.*, 286 Neb. 1, 834 N.W.2d 236 (2013).

[4] *Id.*

[5] *Butler County Dairy v. Butler County*, 285 Neb. 408, 827 N.W.2d 267 (2013); *In re Interest of Kendra M. et al.*, 283 Neb. 1014, 814 N.W.2d 747 (2012).

[6] *Evans v. Metropolitan Utilities Dist.*, 187 Neb. 261, 188 N.W.2d 851 (1971).

[7] § 14-2102.

supervision, and control of all matters pertaining to the natural gas supply . . . of the district."[8] The board has the power and authority to determine and fix natural gas rates.[9] When M.U.D. is supplied with natural gas by any limited liability company or corporation, the board has the power and authority to fix rates and regulate the conditions of service.[10]

[4-6] The issue presented in this appeal is whether M.U.D. is legally required to seek competitive bids before entering into a contract for interstate transmission of natural gas. Competitive bids and public letting are unquestionably a matter of legislative prerogative.[11] Therefore, we focus our inquiry on two statutes which apply to the authority of a metropolitan utilities district to enter into contracts. We do so mindful of the principle that the language of a statute is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[12] Also, if the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.[13]

The first statute, § 14-2121, provides:

> The board of directors shall have authority to receive bids for all work which it may desire to have done by contract or for material and supplies to be used in connection with such work, which bids shall be received after reasonable advertisement therefor and when opened shall be read in public session. The board of directors may award contracts based upon the bids to the lowest responsible bidders, except that the board of directors may, for such reasons as appear to it good and substantial, reject all bids. The board of directors shall have power and authority to do all of such work and to purchase materials

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[8] § 14-2113.

[9] § 14-2114.

[10] § 14-2119.

[11] *Anderson v. Peterson*, 221 Neb. 149, 375 N.W.2d 901 (1985).

[12] *Robertson v. Jacobs Cattle Co.*, 285 Neb. 859, 830 N.W.2d 191 (2013).

[13] *Watkins v. Watkins*, 285 Neb. 693, 829 N.W.2d 643 (2013).

> and supplies without advertising for bids and without entering into contract with any other persons or companies in relation thereto.

The district court determined that this statute does not require competitive bidding, but, rather, grants M.U.D. the discretion whether or not to go through a bidding process.

[7] M.U.D. argues that the plain meaning of the phrase "shall have authority to receive bids" in the first sentence of § 14-2121 and the phrase "may award contracts" in the second sentence support the district court's conclusion that the statute allows but does not require competitive bidding. M.U.D. notes that when the Legislature has imposed a competitive bidding requirement, it has used markedly different language. For example, with respect to certain public power and irrigation district contracts exceeding a specified amount, the Legislature has required that "no such contract shall be entered into without advertising for sealed bids."[14] Likewise, in a statute applicable to cities of the first class, the Legislature provided that "[a]dvertisements for bids shall be required for any contract costing over thirty thousand dollars" entered into for specified public improvements.[15] Although § 14-2121 includes no similar language mandating competitive bidding, Bruno argues that when the first two sentences of the statute are considered along with the third sentence, the statute must be read to mean that M.U.D. is required to let competitive bids on all work which is not performed by its own employees. We need not resolve this dispute with respect to the meaning of § 14-2121, because we conclude that the issue before us in this case is controlled by § 14-2125(1), which provides:

> A metropolitan utilities district may enter into agreements with other companies or municipalities operating gas distribution systems and with gas pipeline companies, whether within or outside the state, for the transportation, purchase, sale, or exchange of available gas supplies or propane supplies held for peak-shaving purposes, so as to

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[14] Neb. Rev. Stat. § 70-637(2) (Reissue 2009).

[15] Neb. Rev. Stat. § 16-321(4) (Reissue 2012).

> realize full utilization of available gas supplies and for the mutual benefit of the contracting parties.

In contrast to the general provisions of § 14-2121, this statute pertains specifically to the type of contract at issue in this case. Where general and special provisions of statutes are in conflict, the general law yields to the special.[16]

[8] Section 14-2125(1) makes no mention of competitive bidding. An appellate court will not read into a statute a meaning that is not there.[17] Formulation of a statutory requirement for competitive bids would involve minimal effort with plain language[18]—a task within the province of the Legislature. Moreover, § 14-2125(1) authorizes M.U.D. to enter into agreements for the "transportation, purchase, sale, or exchange" of gas supplies based upon factors other than the lowest cost, namely, "full utilization of available gas supplies and for the mutual benefit of the contracting parties." The district court correctly determined that there was no statutory competitive bidding requirement with respect to the contract at issue.

Bruno also contends that the district court erred in failing to find that strong public policy considerations require competitive bidding. But that determination was not for the district court, or this court, to make. Rather, the "Legislature is the appropriate forum for resolution of questions concerning Nebraska's policy on the . . . relationship between competitive bidding and expenditures of public funds."[19] The role of the courts is to construe applicable statutes to determine whether the Legislature has imposed a competitive bidding requirement in a specific context.[20] In this case, we agree with the district court that it did not, and that concludes our inquiry.

Bruno argues that the district court failed to address his contention that the contract in question was "ultra vires."

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[16] See *J.M. v. Hobbs*, 281 Neb. 539, 797 N.W.2d 227 (2011).

[17] *Holdsworth v. Greenwood Farmers Co-op*, 286 Neb. 49, 835 N.W.2d 30 (2013).

[18] *Anderson v. Peterson*, *supra* note 11.

[19] *Id.* at 156, 375 N.W.2d at 906.

[20] *Id.*

Although Bruno's complaint included a general allegation that the contract was "ultra vires, illegal, and void," he alleged no facts to support this claim other than alleged noncompliance with a statutory competitive bidding requirement. He sought declaratory relief based on a single specific allegation: that the M.U.D. contract with Northern and those which preceded it "have been entered into without complying with the bidding statutes and common law bidding requirements." As we have noted, the district court correctly determined that there was no statutory requirement for competitive bidding and properly declined to judicially impose such a requirement on public policy grounds. We conclude that the district court disposed of all claims raised by Bruno's complaint.

[9] Finally, Bruno argues that the district court erred in dismissing his complaint. To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face.[21] In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.[22] Bruno's claim rested entirely on the single issue of whether the law required M.U.D. to seek competitive bids before entering into the agreement with Northern. The district court correctly determined that it did not. Bruno's claim to relief was not plausible on its face, because its legal premise was incorrect. The district court did not err in dismissing his complaint.

CONCLUSION

For the reasons discussed, the judgment of the district court is affirmed.

AFFIRMED.

MILLER-LERMAN, J., not participating.

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[21] *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010).

[22] *Id.*

TROY HESS, ALSO KNOWN AS ANTHONY MONJAREZ, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

843 N.W.2d 648

Filed February 28, 2014. No. S-13-413.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
2. **Tort Claims Act: Appeal and Error.** The findings of fact of the trial court in a proceeding under the State Tort Claims Act have the effect of jury findings and will not be disturbed on appeal unless they are clearly wrong.
3. **Statutes: Appeal and Error.** Absent anything to the contrary, an appellate court will give statutory language its plain and ordinary meaning.
4. ____: ____. When construing a statute, an appellate court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
5. **Convictions: Sentences: Words and Phrases.** Legal innocence is defined as the absence of one or more procedural or legal bases to support the sentence given to a defendant.
6. ____: ____: ____. Actual innocence refers to the absence of facts that are prerequisites for the sentence given to a defendant.
7. **Statutes.** A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous.
8. **Trial: Evidence: Appeal and Error.** In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party.

Appeal from the District Court for Douglas County: J RUSSELL DERR, Judge. Affirmed.

Troy Hess, pro se.

Jon Bruning, Attorney General, and Linda L. Willard for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

HEAVICAN, C.J.

INTRODUCTION

Troy Hess filed a pro se action for compensation under the Nebraska Claims for Wrongful Conviction and Imprisonment Act (Act).[1] The district court concluded that Hess failed to

[1] Neb. Rev. Stat. §§ 29-4601 to 29-4608 (Cum. Supp. 2012).

show that he was innocent of the charges for which he claims he was wrongfully convicted and dismissed Hess' petition. We affirm.

BACKGROUND

On October 30, 1985, Hess was charged with second degree murder in the death of Michael Snell. Hess was found guilty following a jury trial and was sentenced to 30 years' imprisonment. His conviction was upheld on appeal.[2]

This court subsequently decided *State v. Myers*.[3] In *Myers*, we held that malice was an essential element of the crime of second degree murder and that if the jury was not so instructed, reversal of the conviction was required. In accordance with *Myers*, an arrest of judgment was entered in November 1994 vacating Hess' conviction and ordering retrial.

A few months prior to our decision in *Myers*, however, Hess had been charged in Lancaster County District Court with escape, kidnapping, felon in possession of a firearm, and two counts of use of a weapon to commit a felony. He was tried and found guilty on November 7, 1994, and sentenced on all counts, including a life sentence for the kidnapping count. The second degree murder charges with respect to Snell's murder were eventually dismissed.

On July 30, 2009, Hess filed a claim with the State Tort Claims Board, asking for compensation under the Act. That claim was denied. Hess filed suit against the State, alleging that he was entitled to damages of $500,000 for his wrongful conviction for second degree murder. Hess also requested the appointment of counsel.

Hess' request for the appointment of counsel was denied. The State's various motions for summary judgment on the merits were denied. Trial was held on February 11, 2013. The only disputed issue was whether Hess was innocent of the second degree murder charge. Hess, relying on the presumption of innocence in criminal cases, argued that he did not need to

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[2] *State v. Hess*, 225 Neb. 91, 402 N.W.2d 866 (1987).

[3] *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994), *overruled, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

prove his innocence. The district court rejected that argument. After examining the bill of exceptions from Hess' murder trial, the district court found that Hess had not shown that he was innocent of the murder, as required by the Act, and dismissed Hess' petition.

ASSIGNMENTS OF ERROR

On appeal, Hess assigns, restated and reordered, that the district court erred in (1) requiring Hess to prove his innocence; (2) not finding Hess innocent under the Act; (3) denying his motion for counsel; and (4) considering exhibit 3, Hess' Lancaster County convictions for escape, kidnapping, felon in possession of a firearm, and use of a weapon to commit a felony.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.[4]

[2] The findings of fact of the trial court in a proceeding under the State Tort Claims Act have the effect of jury findings and will not be disturbed on appeal unless they are clearly wrong.[5]

ANALYSIS

Wrongful Conviction Claim

In his first and second assignments of error, Hess argues that the district court erred in finding that he had the burden to show that he was innocent of second degree murder, and further erred in finding that he was not innocent.

Section 29-4603 provides:

> In order to recover under the . . . Act, the claimant shall prove each of the following by clear and convincing evidence:
>
> (1) That he or she was convicted of one or more felony crimes and subsequently sentenced to a term of

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[4] *State v. Abdulkadir*, 286 Neb. 417, 837 N.W.2d 510 (2013).

[5] *McMullin Transfer v. State*, 225 Neb. 109, 402 N.W.2d 878 (1987).

> imprisonment for such felony crime or crimes and has served all or any part of the sentence;
>
> (2) With respect to the crime or crimes under subdivision (1) of this section, that the Board of Pardons has pardoned the claimant, that a court has vacated the conviction of the claimant, or that the conviction was reversed and remanded for a new trial and no subsequent conviction was obtained;
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> (3) That he or she was innocent of the crime or crimes under subdivision (1) of this section; and
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> (4) That he or she did not commit or suborn perjury, fabricate evidence, or otherwise make a false statement to cause or bring about such conviction or the conviction of another, with respect to the crime or crimes under subdivision (1) of this section, except that a guilty plea, a confession, or an admission, coerced by law enforcement and later found to be false, does not constitute bringing about his or her own conviction of such crime or crimes.

The crux of Hess' argument appears to be that he does not have the burden to show that he was innocent, as required by § 29-4603(3), because he is presumed innocent and the State must prove his guilt.

[3,4] Hess is incorrect. First, it is clear that Hess, and claimants in situations similar to that of Hess, has the burden to show the various elements required under § 29-4603. Absent anything to the contrary, an appellate court will give statutory language its plain and ordinary meaning.[6] When construing a statute, an appellate court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.[7]

The opening paragraph of § 29-4603 provides that "the claimant shall prove each of the following by clear and convincing

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[6] *In re Interest of Zylena R. & Adrionna R.*, 284 Neb. 834, 825 N.W.2d 173 (2012).

[7] *In re Estate of Fries*, 279 Neb. 887, 782 N.W.2d 596 (2010).

evidence." And § 29-4602, the legislative findings for the Act, states that "the Legislature intends by enactment of the . . . Act that persons who can demonstrate that they were wrongfully convicted shall have a claim against the state." Clearly, the burden lies with the claimant under the Act.

Nor does the presumption of innocence have any effect on Hess' burden under § 29-4603(3). As an initial matter, there is no mention of the presumption of innocence in § 29-4603, and more fundamentally, Hess' reliance on the presumption of innocence shows a misunderstanding of the definition of innocence generally.

[5] There are two distinct definitions of innocence—legal and actual. Black's Law Dictionary defines legal innocence as "[t]he absence of one or more procedural or legal bases to support the sentence given to a defendant."[8] Legal innocence is addressed in § 29-4603(2), in that the claimant must show that he or she was pardoned, that the conviction was vacated, or that the conviction was reversed and remanded for retrial and no subsequent conviction was obtained. All of these go to the "absence of one or more procedural bases [that] support the [defendant's] sentence." The presumption of innocence fits within the concept of legal innocence.

[6] "Actual innocence," on the other hand, refers to "[t]he absence of facts that are prerequisites for the sentence given to a defendant."[9] This is what is addressed in § 29-4603(3). In lay terms, actual innocence means that a defendant did not commit the crime for which he or she is charged.

[7] If this court were to interpret subsection (3) as referring to legal, as opposed to actual, innocence, then subsection (3) would be repetitive of subsection (2). But a court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous.[10] In other words, as is noted by the State, "Hess's proposed

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[8] Black's Law Dictionary 859 (9th ed. 2009).

[9] *Id.*

[10] *Holdsworth v. Greenwood Farmers Co-op*, 286 Neb. 49, 835 N.W.2d 30 (2013).

interpretation would make subsection (3) a tautology of subsection (2).”[11] Under the provisions of § 29-4603, Hess must show both types of innocence.

The presumption of innocence has no application or bearing on the burden imposed upon a claimant under § 29-4603(3) of the Act. The district court did not err in concluding that Hess had the burden to show that he was innocent.

Nor did the district court err in finding that Hess had not shown that he was actually innocent under § 29-4603(3). Hess introduced one exhibit—the docket sheet from his second degree murder conviction and its subsequent vacation and dismissal. But such only goes to make a showing of legal innocence under § 29-4603(2). Hess produced no evidence to show that he was actually innocent of Snell’s murder.

Moreover, the State introduced the bill of exceptions from Hess’ second degree murder trial. That bill tends to show that Hess committed the crime for which he now alleges he was wrongfully convicted. Hess’ conviction and sentence were vacated on the basis of jury instructions regarding malice and not as the result of any definitive conclusion about Hess’ guilt in Snell’s death.

Hess’ first and second assignments of error are without merit.

Appointment of Counsel

In his third assignment of error, Hess contends that the district court erred in denying his request for the appointment of counsel. In support of this assertion, Hess cites two Eighth Circuit cases wherein parties appearing in forma pauperis were appointed counsel in civil cases.[12]

As an initial matter, we note that a claim under the Act is a civil action. The plain language of the Act provides that the burden to show entitlement to recovery is on the person who claims he was wrongfully convicted.[13] And the Act provides

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[11] Brief for appellee at 10.

[12] *In re Lane*, 801 F.2d 1040 (8th Cir. 1986); *Johnson v. Williams*, 788 F.2d 1319 (8th Cir. 1986).

[13] §§ 29-4602 and 29-4603.

that any claim must be brought in accordance with the State Tort Claims Act,[14] which is a civil remedy.[15]

There are limited situations in Nebraska where a civil litigant might be entitled to the appointment of counsel. Of course, the Nebraska Postconviction Act allows a court to appoint counsel.[16] We have also held that an indigent defendant jailed for civil contempt is entitled to counsel,[17] as is an indigent father in a paternity action.[18]

But there is no provision in the Act for the appointment of counsel. Nor do the Eighth Circuit cases cited by Hess provide authority of the appointment of counsel. Federal law gives certain discretion for the appointment of counsel for parties appearing in forma pauperis.[19] Nebraska law contains no similar provision.

The district court did not err when it denied Hess' request for counsel. Hess' third assignment of error is without merit.

Exhibit 3

In his fourth and final assignment of error, Hess argues that the district court erred in considering exhibit 3, Hess' Lancaster County convictions for escape, kidnapping, felon in possession of a firearm, and use of a weapon to commit a felony. Exhibit 3 was admitted during a summary judgment hearing, but was not offered or admitted at trial. The district court referenced these prior convictions in setting forth the factual background surrounding Hess' claim.

Hess argues the district court concluded that because of these prior convictions, Hess was not eligible for compensation under the Act. But the district court made no such finding, and

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[14] § 29-4607.

[15] Neb. Rev. Stat. § 81-8,209 (Reissue 2008).

[16] Neb. Rev. Stat. § 29-3004 (Reissue 2008).

[17] *Allen v. Sheriff of Lancaster Cty.*, 245 Neb. 149, 511 N.W.2d 125 (1994), *overruled on other grounds, Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010).

[18] *Carroll v. Moore*, 228 Neb. 561, 423 N.W.2d 757 (1988).

[19] 28 U.S.C. § 1915(e)(1) (2006).

in fact, its order specifically noted that these convictions were unrelated. Hess' argument is without merit.

[8] Even assuming that the district court erred in referencing exhibit 3, such was not reversible error. In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party.[20] A review of the order demonstrates that the district court did not consider these convictions in reference to the question presented—whether Hess had made the necessary showing under § 29-4603 to obtain relief under the Act. Instead, the district court's dismissal of Hess' petition was based upon Hess' failure to show by clear and convincing evidence that he was innocent of second degree murder.

Hess' fourth assignment of error is without merit.

CONCLUSION

The decision of the district court is affirmed.

AFFIRMED.

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[20] *Simon v. Drake*, 285 Neb. 784, 829 N.W.2d 686 (2013).

IN RE INTEREST OF MARCELLA G., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLANT, V. MARCELLA G., APPELLEE.

847 N.W.2d 276

Filed February 28, 2014. No. S-13-644.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
3. ____: ____. Absent anything to the contrary, an appellate court will give statutory language its plain and ordinary meaning.
4. **Statutes.** A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.

5. **Juvenile Courts.** For purposes of Neb. Rev. Stat. § 43-247.02 (Supp. 2013), the date a juvenile is committed to the Office of Juvenile Services for treatment is controlling, not the date of a subsequent transfer to a youth rehabilitation and treatment center.
6. ____. At the time of a commitment to the Office of Juvenile Services, the juvenile court is required to determine the initial level of treatment.
7. ____. If after commitment the Office of Juvenile Services later desires to transfer a juvenile to a higher level of care, it must seek court approval.
8. **Statutes.** Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme, giving effect to every provision.
9. **Statutes: Appeal and Error.** When possible, an appellate court will try to avoid a statutory construction that would lead to an absurd result.
10. **Juvenile Courts: Words and Phrases.** For purposes of the Health and Human Services, Office of Juvenile Services Act, the term "committed" means an order by a court committing a juvenile to the care and custody of the Office of Juvenile Services for treatment.

Appeal from the Separate Juvenile Court of Lancaster County: ROGER J. HEIDEMAN, Judge. Affirmed.

Jon Bruning, Attorney General, and C.J. Roberts, Special Assistant Attorney General, for appellant.

Dennis R. Keefe, Lancaster County Public Defender, and Margene M. Timm for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

CASSEL, J.

INTRODUCTION

In 2013, the Legislature transferred treatment supervision in most cases involving juvenile law violations from the Office of Juvenile Services (OJS) to probation. A complex statute[1] allocated transitional responsibilities, including those regarding a youth rehabilitation and treatment center (YRTC). In this appeal, a juvenile was committed to OJS for community-based services before July 1, 2013, but after that date, OJS sought to transfer the juvenile to a YRTC. We must decide whether the juvenile court erred in making the transfer without doing so as

[1] Neb. Rev. Stat. § 43-247.02 (Supp. 2013).

a condition of intensive supervised probation (ISP). Because the plain language of the statute[2] allocated this transitional responsibility to OJS, we affirm.

BACKGROUND

On March 1, 2013, the separate juvenile court of Lancaster County adjudicated Marcella G. for a misdemeanor law violation.[3] Following a dispositional hearing, the juvenile court committed Marcella to OJS, an agency of the Nebraska Department of Health and Human Services (DHHS),[4] for treatment at the out-of-home level of care. The commitment order was entered on March 12.

On July 5, 2013, DHHS filed a motion seeking an order approving a higher level of care, from a group-home level of care to the YRTC level of care, as a condition of ISP. The juvenile court sustained the motion for higher level of care and approved the transfer of Marcella to a YRTC. However, the court overruled "[t]hat portion of the motion requesting alternative disposition in the form of [ISP]." The transfer order was entered on July 8.

DHHS timely appealed, and we moved the case to our docket under our statutory authority to regulate the caseloads of the appellate courts of this state.[5]

ASSIGNMENT OF ERROR

DHHS assigns that the juvenile court erred by placing Marcella at the YRTC without making the placement a condition of ISP.

STANDARD OF REVIEW

[1] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.[6]

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[2] § 43-247.02(3).

[3] See Neb. Rev. Stat. § 43-247(1) (Reissue 2008).

[4] See Neb. Rev. Stat. § 43-404 (Reissue 2008).

[5] Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

[6] *In re Interest of Kodi L., ante* p. 35, 840 N.W.2d 538 (2013).

[2] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.[7]

ANALYSIS

Although we decide this case based upon the plain language of the statute, an understanding of OJS' function prior to the enactment of L.B. 561[8] would be helpful. OJS had oversight and control of state juvenile correctional facilities and programs other than the secure youth confinement facility.[9] OJS was charged with adopting and promulgating "rules and regulations for the levels of treatment and for management, control, screening, evaluation, treatment, rehabilitation, parole, transfer, and discharge of juveniles placed with or committed to [OJS]."[10] OJS handled evaluations of juveniles[11] and had administrative authority over the parole function for juveniles committed to a YRTC.[12] Every juvenile committed to OJS under the Nebraska Juvenile Code or for certain criminal offenses prosecuted in adult court[13] remained committed until attaining age 19 or being legally discharged.[14]

L.B. 561 changed OJS' role with respect to juvenile law violators. Through L.B. 561, the Legislature intended that the Nebraska Juvenile Service Delivery Project—which was established in 2012 as a pilot program administered by the Office of Probation Administration[15]—be expanded statewide in a three-step, phase-in process beginning July 1, 2013, with full implementation by July 1, 2014.[16] Among other things, the pilot

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[7] *In re Interest of Violet T.*, 286 Neb. 949, 840 N.W.2d 459 (2013).

[8] 2013 Neb. Laws, L.B. 561.

[9] § 43-404.

[10] Neb. Rev. Stat. § 43-405(4) (Cum. Supp. 2012).

[11] See Neb. Rev. Stat. §§ 43-413 and 43-414 (Reissue 2008) and 43-415 (Cum. Supp. 2012).

[12] Neb. Rev. Stat. § 43-416 (Cum. Supp. 2012).

[13] See Neb. Rev. Stat. § 29-2204(3) (Cum. Supp. 2012).

[14] Neb. Rev. Stat. § 43-412(1) (Cum. Supp. 2012).

[15] See Neb. Rev. Stat. § 43-4101 (Cum. Supp. 2012).

[16] Neb. Rev. Stat. § 43-4102(1) (Supp. 2013).

program sought to prevent the unnecessary commitment of juveniles to OJS, to provide access to services in the community for juveniles placed on probation, and to prevent juveniles from needlessly becoming further entrenched in the juvenile justice system.[17] As a result of the Nebraska Juvenile Service Delivery Project, the Office of Probation Administration will take over the duties of OJS with respect to community supervision and parole of juvenile law violators and of evaluations for such juveniles.[18] The role of OJS will be limited to operating YRTC's and taking care and custody of juveniles placed at YRTC's.[19] With that understanding in place, we turn to the issue on appeal.

The question presented is whether under L.B. 561, a juvenile court can transfer a juvenile who was adjudicated and committed to OJS' custody for treatment prior to July 1, 2013, to a YRTC after July 1 without making the commitment part of an order of ISP in accordance with § 43-247.02(2) and Neb. Rev. Stat. § 43-286(1)(b)(ii) (Supp. 2013). DHHS and Marcella rely upon different subsections of § 43-247.02, which became effective on May 30, 2013. Neither party focuses upon subsection (1), which prohibits certain acts by a juvenile court on and after October 1. We agree that subsection (1) is not implicated in this appeal, because the juvenile court's order was entered prior to that date.

DHHS relies upon subsection (2), and Marcella relies upon subsection (3). These subsections of § 43-247.02 provide:

> (2) Notwithstanding any other provision of Nebraska law, on and after July 1, 2013, a juvenile court shall not commit a juvenile to [OJS] for placement at a [YRTC] except as part of an order of [ISP] under subdivision (1)(b)(ii) of section 43-286.
>
> (3) Nothing in this section shall be construed to limit the authority or duties of [DHHS] in relation to juveniles adjudicated under subdivision (1), (2), (3)(b), or (4) of

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[17] § 43-4101(1) (Supp. 2013).

[18] § 43-4102(1).

[19] *Id.*

> section 43-247 who were committed to the care and custody of [DHHS] prior to October 1, 2013, to [OJS] for community-based services prior to October 1, 2013, or to [OJS] for placement at a [YRTC] prior to July 1, 2013. The care and custody of such juveniles with [DHHS] or [OJS] shall continue in accordance with the Nebraska Juvenile Code and the Juvenile Services Act as such acts existed on January 1, 2013, until:
>
> (a) The juvenile reaches the age of majority;
>
> (b) The juvenile is no longer under the care and custody of the department pursuant to a court order or for any other reason, a guardian other than the department is appointed for the juvenile, or the juvenile is adopted;
>
> (c) The juvenile is discharged pursuant to section 43-412, as such section existed on January 1, 2013; or
>
> (d) A juvenile court terminates its jurisdiction of the juvenile.

DHHS argues that subsection (2) controls and that, thus, any placement at a YRTC may be made only as part of an order of ISP. Marcella, on the other hand, asserts that subsection (2) has no application, because she was committed to OJS prior to July 1, 2013. Marcella contends that subsection (3) is operative and that, thus, the juvenile court properly followed the law that existed on January 1 for a juvenile committed to OJS. DHHS counters that subsection (3) refers to the authority and duties of OJS—not to the court's authority, which it claims is found in subsection (2).

[3,4] Our analysis is driven by the plain language of the entire section,[20] including both subsections (2) and (3). Absent anything to the contrary, an appellate court will give statutory language its plain and ordinary meaning.[21] Under the plain language of subsection (3), nothing in "this section"—which means all of § 43-247.02 and obviously includes subsection (2)—limits DHHS' authority or duties in relation to juveniles,

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[20] § 43-247.02.

[21] *In re Interest of Zylena R. & Adrionna R.*, 284 Neb. 834, 825 N.W.2d 173 (2012).

such as Marcella, who were adjudicated under § 43-247(1) and were committed to the custody of OJS for community-based services prior to October 1, 2013. Section 43-247.02(3) provides that the care and custody of such juveniles shall continue as the Nebraska Juvenile Code and the Juvenile Services Act existed on January 1. And on January 1, those acts did not include a provision for ISP if a juvenile is placed at a YRTC. Further, a court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.[22] Accepting DHHS' interpretation would render § 43-247.02(3) meaningless.

[5,6] For purposes of L.B. 561, the date a juvenile is committed to OJS for treatment is controlling, not the date of a subsequent transfer to a YRTC. At the time of commitment to OJS, the juvenile court is required to determine the initial level of treatment.[23] Here, the court committed Marcella to OJS' custody in March 2013 and ordered initial treatment at the out-of-home level of care. OJS was then charged with selecting a specific placement for Marcella within the level of treatment selected by the court.[24]

[7] If after commitment OJS later desires to transfer a juvenile to a higher level of care, it must seek court approval.[25] That is what happened in this case. In the juvenile court's initial dispositional order, it committed Marcella to OJS for treatment at a level less restrictive than a YRTC. Later, OJS requested the committing court to approve a transfer to a YRTC—a more restrictive level. OJS was authorized to regulate the transfer of juveniles committed to it until October 1, 2013.[26]

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[22] *Id.*

[23] See, *In re Interest of Matthew P.*, 275 Neb. 189, 745 N.W.2d 574 (2008); Neb. Rev. Stat. § 43-408(1)(b) (Supp. 2013) (previously codified at § 43-408(2) (Reissue 2008)).

[24] See § 43-408(1)(b) and (c) (Supp. 2013) (previously codified at § 43-408(2) and (3) (Reissue 2008)).

[25] See *In re Interest of Matthew P.*, *supra* note 23.

[26] § 43-405(4) (Supp. 2013).

Had the juvenile court initially determined that a YRTC was the appropriate level of treatment, then the provisions of § 43-286—which falls under the statutory section of the Nebraska Juvenile Code addressing disposition—would have been implicated. We recognized this in a case predating L.B. 561, when we stated, "The juvenile code authorizes a court to approve a transfer to a YRTC for juveniles already placed in OJS' custody or to commit a juvenile age 12 or older to a YRTC in a disposition order."[27] We reject DHHS' argument that the date when a juvenile is placed at a YRTC—via a transfer rather than an initial commitment—is dispositive.

[8,9] Our conclusion is bolstered by the plain language of two other statutes pertaining to juveniles committed to OJS. Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme, giving effect to every provision.[28] When possible, an appellate court will try to avoid a statutory construction that would lead to an absurd result.[29]

First, the language of § 43-286 supports our determination that the date of commitment to OJS is controlling. Section 43-286(1) governs a juvenile court's disposition of a juvenile when the court adjudicated the juvenile under § 43-247(1), (2), or (4).[30] Section 43-286(1)(b)(i) specifically applies to "all juveniles committed to [OJS] prior to July 1, 2013," and states that "[t]he court may commit such juvenile to [OJS]," but that the court shall not place a juvenile under 14 years of age at a YRTC unless certain conditions are met. Immediately following that subdivision is § 43-286(1)(b)(ii), which "applies to all juveniles committed to [OJS] for placement at a [YRTC] on or after July 1, 2013." Section 43-286(1)(b)(ii) provides in part:

> [T]he court may commit such juvenile to [OJS] for placement at a [YRTC] as a condition of an order of [ISP] if

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[27] *In re Interest of Trey H.*, 281 Neb. 760, 765, 798 N.W.2d 607, 612 (2011).

[28] *Maycock v. Hoody*, 281 Neb. 767, 799 N.W.2d 322 (2011).

[29] *First Nat. Bank of Omaha v. Davey*, 285 Neb. 835, 830 N.W.2d 63 (2013).

[30] *In re Interest of Edward B.*, 285 Neb. 556, 827 N.W.2d 805 (2013).

> all levels of probation supervision and options for community-based services have been exhausted and placement of such juvenile is a matter of immediate and urgent necessity for the protection of such juvenile or the person or property of another or if it appears that such juvenile is likely to flee the jurisdiction of the court.

If we were to accept DHHS' interpretation, Marcella would fit under both § 43-286(b)(i) and (ii), because she was committed to OJS prior to July 1, 2013, and, as DHHS urges, was "committed" to OJS for placement at a YRTC after July 1. But because these subdivisions have different consequences regarding placement at a YRTC, they were intended to be mutually exclusive. Because Marcella was clearly committed to OJS at a level less restrictive than a YRTC prior to July 1, she could not also be "committed" to OJS for placement at a YRTC on or after July 1.

[10] Second, and for similar reasons, the plain language of § 43-408 (Supp. 2013) supports our conclusion and demonstrates that its subsections were intended to be mutually exclusive. Section 43-408 falls within the Health and Human Services, Office of Juvenile Services Act, and, for purposes of that act, "[c]ommitted means an order by a court committing a juvenile to the care and custody of [OJS] for treatment."[31] And because § 43-408 refers to both a "juvenile committed" by a committing court and a "transfer" of a juvenile by the "court which committed the juvenile," a commitment must differ from a transfer. Here, the court committed Marcella to OJS' custody for treatment in its March 2013 dispositional order. Section 43-408(1) applies to all juveniles committed to OJS for placement at a YRTC prior to July 1 and to all juveniles committed to OJS for community supervision prior to October 1. Marcella fits under the latter provision. Section 43-408(1)(b) then states, among other things, that the committing court shall order the initial level of treatment for a juvenile committed to OJS, that the committing court shall not order a specific placement for a juvenile, and that the court shall continue to

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[31] Neb. Rev. Stat. § 43-403(2) (Reissue 2008).

maintain jurisdiction over any juvenile committed to OJS until discharged from OJS.

Section 43-408(2), on the other hand, applies to all juveniles "committed" to OJS for placement at a YRTC on or after July 1, 2013. The order approving Marcella's transfer to the YRTC does not fall within the definition of "committed,"[32] because she had already been committed to the custody of OJS and, consequently, the order did not state that the court was committing her to the custody of OJS for treatment. And under § 43-408(2)(b), a committing court's only option is to "order placement at a [YRTC] for a juvenile committed to [OJS]." Such court "shall continue to maintain jurisdiction over any juvenile committed to [OJS] for the purpose of reviewing the juvenile's probation upon discharge from the care and custody of [OJS]."[33] Thus, under § 43-408(1)(b), the court's jurisdiction over a juvenile committed to OJS ends upon discharge from OJS, whereas under § 43-408(2)(b), the court continues to maintain jurisdiction over a juvenile upon discharge from OJS for the purpose of reviewing the juvenile's probation. Because the court's continued jurisdiction over juveniles committed to OJS differs under the two subsections, they were clearly intended to be mutually exclusive. And because Marcella was committed to OJS for community supervision prior to October 1 under § 43-408(1), she could not also be committed to OJS for placement at a YRTC on or after July 1 under § 43-408(2). We conclude that Marcella was committed to OJS in March and was never "committed" for placement at a YRTC, but, rather, was placed there following a transfer.

CONCLUSION

The disposition of this appeal is driven by transitional statutory provisions, which soon will no longer apply except to a very small number of offenders committed before July 1, 2013, and remaining under OJS' supervision. Thus, while there may be others affected by this decision, it will not have lasting

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[32] See *id.*

[33] § 43-408(2)(b).

consequences. Under § 43-247.02(2), on and after July 1, 2013, a juvenile court can commit a juvenile to OJS for placement at a YRTC only as part of an order of ISP. But because Marcella had already been committed to OJS for placement at a level less restrictive than a YRTC and only later transferred to a YRTC after July 1, subsection (2) does not apply. We conclude that § 43-247.02(3) controls and that the juvenile court acted within its authority when it transferred Marcella to the YRTC without making the placement as part of an order of ISP.

AFFIRMED.

IN RE INTEREST OF QUINCY J., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLANT, V. QUINCY J., APPELLEE.

847 N.W.2d 69

Filed February 28, 2014. No. S-13-664.

Appeal from the Separate Juvenile Court of Lancaster County: REGGIE L. RYDER, Judge. Affirmed.

Jon Bruning, Attorney General, and C.J. Roberts, Special Assistant Attorney General, for appellant.

Toni Leija-Wilson and S.A. Mora James for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

CASSEL, J.

This case raises the same issue as that presented in *In re Interest of Marcella G.*,[1] decided today. The juvenile court committed Quincy J. to the custody of the Office of Juvenile Services for treatment at a level less restrictive than a youth rehabilitation and treatment center prior to July 1, 2013, and,

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[1] *In re Interest of Marcella G., ante* p. 566, 847 N.W.2d 276 (2014).

after July 1, sustained a motion to transfer him to a youth rehabilitation and treatment center. For the same reasons set forth in *In re Interest of Marcella G.*, we affirm the decision of the juvenile court.

AFFIRMED.

SHERRY HARA, APPELLANT, V.
RUSSELL REICHERT, APPELLEE.
843 N.W.2d 812

Filed March 7, 2014. No. S-13-073.

1. **Judgments: Res Judicata: Collateral Estoppel: Appeal and Error.** The applicability of claim and issue preclusion is a question of law. On a question of law, an appellate court reaches a conclusion independent of the court below.
2. **Judgments: Res Judicata.** Claim preclusion bars the relitigation of a claim that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.
3. **Res Judicata.** Claim preclusion bars relitigation not only of those matters actually litigated, but also of those matters which might have been litigated in the prior action.
4. ____. Claim preclusion rests on the necessity to terminate litigation and on the belief that a person should not be vexed twice for the same cause.
5. **Judgments: Collateral Estoppel.** Issue preclusion bars the relitigation of a finally determined issue that a party had a prior opportunity to fully and fairly litigate. Issue preclusion applies where (1) an identical issue was decided in a prior action, (2) the prior action resulted in a final judgment on the merits, (3) the party against whom the doctrine is to be applied was a party or was in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.
6. **Collateral Estoppel.** Issue preclusion applies only to issues actually litigated.
7. ____. Issue preclusion protects litigants from relitigating an identical issue with a party or his privy and promotes judicial economy by preventing needless litigation.
8. **Res Judicata: Collateral Estoppel.** While the doctrines of claim and issue preclusion are similar and serve similar purposes, they are distinct.
9. **Small Claims Court: Judgments.** A small claims court judgment is in fact a "judgment."
10. **Small Claims Court.** The purpose of small claims court is to provide a prompt and just determination in an action involving small amounts while expending a minimum amount of resources.

11. **Small Claims Court: Res Judicata.** Claim preclusion applies to small claims court judgments.

Appeal from the District Court for Scotts Bluff County: LEO DOBROVOLNY, Judge. Affirmed.

Todd Morten, of Island & Huff, P.C., L.L.O., for appellant.

Robert M. Brenner, of Robert M. Brenner Law Office, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

CONNOLLY, J.

Sherry Hara filed a complaint for declaratory judgment alleging that money she had received from Russell Reichert was a gift and not a loan. Based on a prior small claims court judgment, the district court concluded that Hara's action was barred by both claim preclusion and issue preclusion and dismissed her complaint. Because we determine that claim preclusion applies and its elements are met, we affirm.

BACKGROUND

Reichert originally sued Hara in Dundy County Small Claims Court for $3,500. Reichert claimed that he had loaned Hara $4,000 to help her buy a car. At the time of the transaction, Reichert and Hara were dating. Hara did not deny receiving the money, but she claimed that Reichert had given her the money as a gift. After a bench trial, the small claims court found that the transaction was a loan and entered judgment for Reichert.

Hara appealed the small claims court judgment to the county court for Dundy County. While the appeal was pending, Hara filed a complaint for declaratory judgment in the Scotts Bluff County Court, seeking a declaration that the $4,000 was a gift rather than a loan and for the court to find that the small claims court judgment "[had] been satisfied in full." Hara later dismissed her pending appeal, apparently for financial reasons. Reichert moved to dismiss Hara's complaint in the Scotts Bluff County Court, which the court granted. Hara then filed a complaint for declaratory judgment in the

district court for Scotts Bluff County, again seeking a declaration that the $4,000 was a gift rather than a loan and for the court to find that the small claims court judgment "[had] been satisfied in full."

Reichert again moved to dismiss Hara's complaint, which the court granted. The court reasoned that both claim preclusion and issue preclusion applied and barred Hara's action. The court recognized that *Henriksen v. Gleason*[1] stated that, given the procedural differences in small claims court, "it is inappropriate to give any issue preclusive effect to any small claims court judgment in a later proceeding brought in county or district court."[2] But the court found *Henriksen* distinguishable because the claim here was the exact same claim and *Henriksen* made that statement only as to issue preclusion, not claim preclusion. The court also reasoned that if *Henriksen* were read broadly, then "within the statute of limitations for the particular cause of action, a successful litigant in small claims [court] could not rely on [that court's] judgment." The court dismissed Hara's complaint, and she appealed.

ASSIGNMENT OF ERROR

Hara assigns, restated, that the district court erred in concluding that her complaint was barred by both claim preclusion and issue preclusion.

STANDARD OF REVIEW

[1] The applicability of claim and issue preclusion is a question of law.[3] On a question of law, we reach a conclusion independent of the court below.[4]

ANALYSIS

Relying on *Henriksen*,[5] Hara argues that a small claims court judgment cannot be given any preclusive effect, under

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[1] *Henriksen v. Gleason*, 263 Neb. 840, 643 N.W.2d 652 (2002).

[2] *Id.* at 845, 643 N.W.2d at 657.

[3] See *Eicher v. Mid America Fin. Invest. Corp.*, 270 Neb. 370, 702 N.W.2d 792 (2005).

[4] See, e.g., *In re Interest of S.C.*, 283 Neb. 294, 810 N.W.2d 699 (2012).

[5] *Henriksen, supra* note 1.

either claim preclusion or issue preclusion, because of the procedural limitations of small claims court. We agree that under *Henriksen*, issue preclusion does not apply to small claims court judgments, and that the district court therefore erred in concluding that issue preclusion barred Hara's suit. But *Henriksen* speaks only to issue preclusion and not claim preclusion. Because claim preclusion applies to small claims court judgments, and because all of its elements are met here, we affirm the district court's dismissal.

Principles of Preclusion

In the past, we have referred to claim preclusion and issue preclusion as res judicata and collateral estoppel.[6] Courts and commentators have moved away from that terminology and now use the terms claim preclusion and issue preclusion.[7] Put simply, they are more clear and descriptive.[8]

[2-4] Claim preclusion bars the relitigation of a claim that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.[9] The doctrine bars relitigation not only of those matters actually litigated, but also of those matters which might have been litigated in the prior action.[10] The doctrine rests on

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[6] See, e.g., *Kiplinger v. Nebraska Dept. of Nat. Resources*, 282 Neb. 237, 803 N.W.2d 28 (2011), *disapproved in part on other grounds, Banks v. Heineman*, 286 Neb. 390, 837 N.W.2d 70 (2013); *Eicher, supra* note 3; *In re Estate of Wagner*, 246 Neb. 625, 522 N.W.2d 159 (1994).

[7] See, e.g., *Taylor v. Sturgell*, 553 U.S. 880, 128 S. Ct. 2161, 171 L. Ed. 2d 155 (2008); Restatement (Second) of Judgments ch. 3 (1982); John P. Lenich, Nebraska Civil Procedure § 8:3 (2008); Christopher Klein et al., *Principles of Preclusion and Estoppel in Bankruptcy Cases*, 79 Am. Bankr. L.J. 839 (2005).

[8] See, e.g., *Taylor, supra* note 7; Klein et al., *supra* note 7.

[9] See *Eicher, supra* note 3.

[10] See *id.*

the necessity to terminate litigation and on the belief that a person should not be vexed twice for the same cause.[11]

[5-7] Issue preclusion bars the relitigation of a finally determined issue that a party had a prior opportunity to fully and fairly litigate.[12] Issue preclusion applies where (1) an identical issue was decided in a prior action, (2) the prior action resulted in a final judgment on the merits, (3) the party against whom the doctrine is to be applied was a party or was in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.[13] Issue preclusion applies only to issues actually litigated.[14] Issue preclusion protects litigants from relitigating an identical issue with a party or his privy and promotes judicial economy by preventing needless litigation.[15]

[8] While the doctrines are similar and serve similar purposes, they are distinct.[16] A close examination of their elements shows this to be true. Claim preclusion looks to the entire cause of action as opposed to a single issue. Claim preclusion does not require a full and fair opportunity to litigate, whereas issue preclusion does. Claim preclusion bars litigation of matters not actually litigated, whereas issue preclusion applies only to issues actually litigated. Claim preclusion also applies only between the parties (or their privies) who were

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[11] See *id.*

[12] See *In re Margaret Mastny Revocable Trust*, 281 Neb. 188, 794 N.W.2d 700 (2011).

[13] See *id.*

[14] See, *Bobby v. Bies*, 556 U.S. 825, 129 S. Ct. 2145, 173 L. Ed. 2d 1173 (2009); *Peterson v. The Nebraska Nat. Gas Co.*, 204 Neb. 136, 281 N.W.2d 525 (1979); *Schneider v. Lambert*, 19 Neb. App. 271, 809 N.W.2d 515 (2011); Restatement, *supra* note 7, § 27; Lenich, *supra* note 7.

[15] See, e.g., *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979); *Thomas Lakes Owners Assn. v. Riley*, 9 Neb. App. 359, 612 N.W.2d 529 (2000).

[16] See, e.g., *Billingsley v. BFM Liquor Mgmt.*, 264 Neb. 56, 645 N.W.2d 791 (2002). See, also, Restatement, *supra* note 7, §§ 17 through 29; Lenich, *supra* note 7; 50 C.J.S. *Judgments* § 928 (2009).

involved in the prior action,[17] while issue preclusion may be used by a nonparty in a later action, either offensively or defensively.[18]

An example of the doctrines and how they might interact in a hypothetical situation might be helpful. Take, for example, a car (driven by Adam), which collides with two other cars (driven by Brody and Carl). Brody sues Adam, on a theory of negligence, for damage to his car. Adam denies that he was negligent. A jury finds otherwise and final judgment is entered against Adam. Brody cannot later maintain a separate suit, on the same facts, for additional damage to items in his car's trunk. Claim preclusion would bar the suit. Now Carl sues Adam, also on a theory of negligence, for damage to his car. Claim preclusion would not apply, because Carl was not involved in the prior adjudication. But assuming the same essential facts, issue preclusion would prevent Adam from contesting his negligence; that issue was actually and finally decided in the prior suit between Adam and Brody.

Preclusion for Small Claims Court Judgments

Hara's argument—that neither claim preclusion nor issue preclusion applies to a small claims court judgment—rests entirely on *Henriksen v. Gleason*.[19] In that case, Jim Gleason sued Greg Henriksen in small claims court for failing to pay money under a contract. The small claims court entered a default judgment for Gleason, and Henriksen later satisfied the judgment. Henriksen then sued Gleason in county court alleging that, basically, Gleason's performance under the contract was deficient. Although Gleason argued that the prior judgment had a preclusive effect, the county court disagreed and found for Henriksen.[20]

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[17] See, *Eicher, supra* note 3; 47 Am. Jur. 2d *Judgments* § 577 (2006); 50 C.J.S., *supra* note 16.

[18] See, *JED Constr. Co., Inc. v. Lilly*, 208 Neb. 607, 305 N.W.2d 1 (1981); *Peterson, supra* note 14; *Thomas Lakes Owners Assn., supra* note 15. See, also, 50 C.J.S., *supra* note 16, § 1098.

[19] *Henriksen, supra* note 1.

[20] See *id.*

On appeal, we noted that issue preclusion "should not apply when a new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them."[21] We then explained:

> Proceedings in small claims courts are conducted on a very informal basis, with a minimum of procedural requirements. . . . For example, the jurisdiction of small claims court is currently limited to those cases where the amount in controversy does not exceed $2,400, . . . parties are not represented by counsel, . . . matters are tried without a jury, . . . few formal pleadings are required, . . . and the formal rules of evidence do not apply. . . . The setting in small claims court affords parties the opportunity to obtain a prompt and just determination in an action involving small amounts while expending a minimum amount of resources. This setting is vastly different from the relatively more complex and time-consuming litigation that occurs in county or district courts. Given these procedural differences, we believe it is inappropriate to give any issue preclusive effect to any small claims court judgment in a later proceeding brought in county or district court. For that reason, the county court was not barred from litigating the issue of Gleason's performance under the contract.[22]

Based on *Henriksen*, Hara argues that the prior small claims court judgment cannot be given any preclusive effect, under either claim preclusion or issue preclusion.

But *Henriksen* held only that issue preclusion did not apply to small claims court judgments. This is apparent from its language and reasoning. For example, *Henriksen* repeatedly stated that it was inappropriate to give a small claims court judgment any "issue preclusive effect,"[23] and after emphasizing the procedural limitations of small claims court, *Henriksen*

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[21] *Id.* at 844-45, 643 N.W.2d at 656.

[22] *Id.* at 845, 643 N.W.2d at 656-57 (citations omitted).

[23] *Id.* at 845, 643 N.W.2d at 657-58.

explained that "[f]or that reason, the county court was not barred from litigating *the issue of Gleason's performance under the contract*."[24] *Henriksen* also relied heavily on § 28(3) of the Restatement (Second) of Judgments and its accompanying comment *d.*, which pertained exclusively to issue preclusion.[25] And the only case we cited in our analysis, *Flobert Industries v. Stuhr*,[26] also involved only issue preclusion.

Henriksen did not hold that claim preclusion was inapplicable to small claims court judgments. Such a holding would have been inconsistent with our prior case law.[27] Indeed, *Henriksen* did not address claim preclusion at all, for whatever reason, even though it was squarely presented by the fact pattern before us. Had we addressed it, we likely would have found that claim preclusion barred the suit.[28]

[9,10] As impliedly noted, we have previously applied claim preclusion to a small claims court judgment.[29] And, for several reasons, we continue to believe that claim preclusion is applicable to small claims court judgments. First, a small claims court judgment is in fact a "judgment,"[30] and claim preclusion, a fundamental principle of the law of judgments,[31] should apply absent some persuasive reason (or reasons) otherwise. Second, were we not to apply claim preclusion to small claims court judgments, the small claims court would be rendered meaningless, its judgments effectively neutered, because any dissatisfied party could simply file a new action on the same claim in county or district court. This would

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[24] *Id.* at 845, 643 N.W.2d at 657 (emphasis supplied).

[25] See, *Henriksen*, *supra* note 1; Restatement, *supra* note 7, § 28(3) and comment *d.*

[26] *Flobert Industries v. Stuhr*, 216 Neb. 389, 343 N.W.2d 917 (1984).

[27] See *DeCosta Sporting Goods, Inc. v. Kirkland*, 210 Neb. 815, 316 N.W.2d 772 (1982).

[28] See, *id.*; *Pipe & Piling Supplies v. Betterman & Katelman*, 8 Neb. App. 475, 596 N.W.2d 24 (1999); Lenich, *supra* note 7, § 8:13.

[29] See *DeCosta Sporting Goods, Inc.*, *supra* note 27.

[30] See *Nebraska Dept. of Health & Human Servs. v. Weekley*, 274 Neb. 516, 741 N.W.2d 658 (2007).

[31] See, generally, Restatement, *supra* note 7.

be antithetical to the small claims court's purpose, which is to provide "a prompt and just determination in an action involving small amounts while expending a minimum amount of resources."[32]

Third, our statutes provide a dissatisfied party with the opportunity to appeal from a small claims court judgment.[33] Those statutes would also be rendered meaningless if claim preclusion did not apply to small claims court judgments, because a party would *never* appeal; on appeal, the reviewing court looks only for "error appearing on the record,"[34] whereas in a new action, the dissatisfied party would start from scratch. Fourth, it is fair for the parties to be bound by the judgment of the small claims court when they choose to proceed there. The plaintiff chooses where to file his action and, if unhappy with the small claims court's procedural limitations, can choose to file it in a court of general jurisdiction. And the defendant, if he does not want to proceed in small claims court, can transfer the case to county court.[35]

[11] Other courts have similarly concluded that claim preclusion applies to small claims court judgments.[36] Moreover, our research reveals several jurisdictions that apply claim preclusion to small claims court judgments while limiting or not applying issue preclusion.[37] Although Hara argues otherwise, we see no problem with treating the doctrines differently; they

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[32] *Henriksen, supra* note 1, 263 Neb. at 845, 643 N.W.2d at 657. See, also, Neb. Rev. Stat. § 25-2806 (Reissue 2008).

[33] See Neb. Rev. Stat. §§ 25-2728 through 25-2738 (Reissue 2008 & Cum. Supp. 2012) and 25-2807 (Reissue 2008).

[34] See §§ 25-2733 and 25-2807.

[35] See Neb. Rev. Stat. § 25-2805 (Cum. Supp. 2012).

[36] See, e.g., *Allen v. Moyer*, 259 P.3d 1049 (Utah 2011); *Hindmarsh v. Mock*, 138 Idaho 92, 57 P.3d 803 (2002); *Peterson v. Newton*, 232 Ariz. 593, 307 P.3d 1020 (Ariz. App. 2013); *Bailey v. Brewer*, 197 Cal. App. 4th 781, 128 Cal. Rptr. 3d 380 (2011); *Doherty v. McMillen*, 805 S.W.2d 361 (Mo. App. 1991); *Bagley v. Hughes*, 465 N.W.2d 551 (Iowa App. 1990). But see *Isaac v. Truck Service, Inc.*, 253 Conn. 416, 752 A.2d 509 (2000).

[37] See, *In re Ault*, 728 N.E.2d 869 (Ind. 2000); *Newton, supra* note 36; *Bailey, supra* note 36; *Clusiau v. Clusiau Enterprises, Inc.*, 225 Ariz. 247, 236 P.3d 1194 (Ariz. App. 2010); *Bagley, supra* note 36.

are separate doctrines with distinct elements.[38] If it were not clear before, we hold that claim preclusion applies to small claims court judgments.

The only remaining question is whether the elements of claim preclusion are met here. They are. Reichert originally sued Hara in small claims court over the same $4,000 and the dispute centered on whether it was a gift or a loan; Hara argued, in her defense, that it was a gift. But after a trial, the small claims court entered judgment for Reichert, finding that it was a loan. Hara did not appeal from that judgment and now seeks to reassert that defense—that the money was a gift and not a loan—in a new action. This she cannot do.[39] Here, we have a former judgment, entered by a court of competent jurisdiction, which was final and on the merits, between the same parties and involving the same claim. Claim preclusion bars Hara's action.

CONCLUSION

We conclude that claim preclusion, but not issue preclusion, applies to small claims court judgments. Because the elements of claim preclusion are satisfied here, the district court correctly dismissed Hara's action.

AFFIRMED.

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[38] See, e.g., *Billingsley, supra* note 16; Restatement, *supra* note 7, §§ 17 through 29; Lenich, *supra* note 7; 50 C.J.S., *supra* note 16. See, also, *Newton, supra* note 36; *Doherty, supra* note 36; *Bagley, supra* note 36.

[39] See 50 C.J.S., *supra* note 16, § 1018. Cf., *Dakota Title v. World-Wide Steel Sys.*, 238 Neb. 519, 471 N.W.2d 430 (1991); *DeCosta Sporting Goods, Inc., supra* note 27.

ORFA I. TORRES, APPELLANT, V. BENJAMIN H. MORALES, APPELLEE.

843 N.W.2d 805

Filed March 7, 2014. No. S-13-106.

1. **Injunction: Judgments: Appeal and Error.** A protection order pursuant to Neb. Rev. Stat. § 42-924 (Cum. Supp. 2012) is analogous to an injunction. Thus, the grant or denial of a protection order is reviewed de novo on the record. In such de novo review, an appellate court reaches conclusions independent of the factual findings of the trial court. However, where the credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the circumstances that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Constitutional Law: Judgments.** Because the intrusion on a respondent's liberty interests is limited, the procedural due process afforded in a protection order hearing is likewise limited.
3. **Judges.** A judge must be careful not to appear to act in the dual capacity of judge and advocate.
4. **Judges: Trial.** A judge must be impartial, his or her official conduct must be free from even the appearance of impropriety, and a judge's undue interference in a trial may tend to prevent the proper presentation of the cause of action.
5. **Judges: Recusal: Presumptions.** A party alleging that a judge acted with bias or prejudice bears a heavy burden of overcoming the presumption of judicial impartiality.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed in part, and in part reversed.

Mark T. Bestul, of Legal Aid of Nebraska, for appellant.

No appearance for appellee.

WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

PER CURIAM.

INTRODUCTION

Orfa I. Torres sought a domestic abuse protection order against Benjamin H. Morales. After a show cause hearing, the district court dismissed the case and taxed the costs to Torres. Torres appeals. We affirm in part, and in part reverse.

BACKGROUND

The Protection from Domestic Abuse Act, Neb. Rev. Stat. § 42-901 et seq. (Reissue 2008 & Cum. Supp. 2012), permits

a victim of domestic abuse to file a petition and affidavit seeking a protection order pursuant to § 42-924.

On January 7, 2013, Torres applied for a protection order against her boyfriend, Morales. Torres described three incidents that she felt warranted the protection order. The district court issued an order to show cause. On January 17, the court held a show cause hearing. Torres appeared with counsel; Morales appeared pro se. The district court judge first called Torres to the witness stand and questioned her regarding the incidents cited in her affidavit.

The first incident Torres described involved an allegedly intoxicated Morales yelling at Torres and her son on Christmas Eve of 2012. Torres testified that after their disagreement, she tried to retrieve her things from Morales' grandparents' home where they had been visiting, but that Morales blocked her in the hallway. Torres pushed Morales, and Morales grabbed Torres' shirt, causing her to fall on top of him. Torres then spit on Morales.

The second incident took place approximately 1½ weeks after the first. Torres described the incident generally as Morales' constantly yelling and calling her names while she tried to avoid him.

The final incident cited by Torres occurred approximately a year prior to the first incident, when Torres was 3 months' pregnant. Torres testified that Morales had been drinking alcohol and that the pair had been arguing. Morales attempted to leave, and, concerned about him driving while intoxicated, Torres came up behind him and held the door closed with her hand. Morales fell backward, on top of Torres. Torres testified that Morales elbowed her in her ribs, so she bit him. Concerned about her pregnancy, Torres went to the emergency room the next morning.

When Torres finished describing the three incidents, the judge called Morales to testify and asked him about the same incidents. Morales recalled the first two events similarly but stated that he was not drinking during the second incident.

At one point during his testimony, Morales admitted, "We have a lot of verbal arguments, and, you know, this might be a good thing for both of us, this order to go in effect."

The court then asked Morales whether he was opposing the order. Morales said that he was not. The court asked Morales if he understood the consequences of the court's issuing the order, and Morales asked what the consequences were. The court listed potential legal consequences, including a prohibition on possessing weapons and a potential effect on future child custody issues. Morales expressed concern that the protection order could possibly affect his job. The court then asked Morales to continue giving his version of the alleged incidents.

Morales described the third incident similarly as well, but stated that he did not recall elbowing Torres and was only pushing her so that he could get out the door to leave.

When Morales finished testifying, the court vacated its order to show cause and dismissed the case. In its written order, the court required Torres to pay the costs of the action. Torres appeals.

ASSIGNMENTS OF ERROR

Torres assigns, reordered, the following errors of the district court: (1) taxing the costs of the protection order to her without making findings by clear and convincing evidence that the statements in the petition and affidavit were false and that the order was sought in bad faith; (2) not allowing her counsel to participate in the proceedings, question Torres, or present any additional evidence; (3) not allowing her counsel to cross-examine Morales; (4) providing legal advice to Morales; (5) failing to inquire whether the actions of Morales caused her bodily injury or placed her in fear of bodily injury; (6) denying Torres a hearing before an impartial decisionmaker; and (7) failing to issue a domestic abuse protection order.

STANDARD OF REVIEW

[1] A protection order pursuant to § 42-924 is analogous to an injunction. Thus, the grant or denial of a protection order is reviewed de novo on the record. In such de novo review, an appellate court reaches conclusions independent of the factual findings of the trial court. However, where the credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the circumstances that

the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.[1]

ANALYSIS

Costs of Action.

In Torres' first assignment of error, she asserts that the district court erred in taxing costs of the action to her without making findings by clear and convincing evidence that the statements contained in her petition and affidavit were false and that the protection order was sought in bad faith.

Section 42-924.01 states in part:

> Fees to cover costs associated with the filing of a petition for a protection order or the issuance or service of a protection order seeking only the relief provided by the Protection from Domestic Abuse Act shall not be charged, except that a court may assess such fees and costs if the court finds, by clear and convincing evidence, that the statements contained in the petition were false and that the protection order was sought in bad faith.

In its order dismissing the case, the district court did not state that it found the facts stated in Torres' affidavit to be untrue by clear and convincing evidence. Furthermore, because Morales described the incidents similarly, our review of the record does not support a finding that the facts stated were untrue.

Black's Law Dictionary defines bad faith as "[d]ishonesty of belief or purpose."[2] No evidence was presented suggesting that Torres sought the order for any purpose other than protection for herself or her children. Morales agreed that the parties often did not get along. Even though the district court found the incidents described did not warrant a protection order, it does not appear that the order was sought in bad faith.

Without findings that the facts in the affidavit were not true or that the order was sought in bad faith, the district court erred in taxing the costs of the action to Torres.

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[1] *Elstun v. Elstun*, 257 Neb. 820, 600 N.W.2d 835 (1999).

[2] Black's Law Dictionary 159 (9th ed. 2009).

Participation of Counsel.

In Torres' second and third assignments of error, she asserts that the court erred in not allowing her counsel to participate in the proceedings, ask questions of either party, or present any additional evidence.

[2] We have said that because the intrusion on a respondent's liberty interests is limited, the procedural due process afforded in a protection order hearing is likewise limited.[3]

In *Elstun v. Elstun*,[4] the trial court explicitly denied requests from counsel for the opposing party to question his client and cross-examine the appellant during a show cause hearing for a protection order. In that case, we quoted Neb. Rev. Stat. § 27-614(1) (Reissue 2008), which states that "[t]he judge may, on his own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called." We therefore found the appellant's statutory right to cross-examine the witnesses had been violated. Similarly, in *Hronek v. Brosnan*,[5] the Nebraska Court of Appeals found the appellant's due process rights were violated when the court made a blanket statement that it was not going to allow counsel to examine or cross-examine witnesses.

In this case, there was no request by either party to question either witness or present additional evidence. Without such a request, or any indication from the court that such a request would be denied, we cannot find that Torres' right to cross-examine Morales was violated.

The district court did not err by questioning Torres and Morales at the hearing, and absent a request from counsel to participate in the hearing, the court did err in not permitting Torres' counsel to question Morales or present additional evidence.

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[3] *Mahmood v. Mahmud*, 279 Neb. 390, 778 N.W.2d 426 (2010). See, also, *Hronek v. Brosnan*, 20 Neb. App. 200, 823 N.W.2d 204 (2012).

[4] *Elstun, supra* note 1.

[5] *Hronek, supra* note 3.

Advising Pro Se Litigant.

In Torres' fourth assignment of error, she asserts that the district court erred in providing legal advice to Morales.

[3] We have held that "[a] judge must be careful not to appear to act in the dual capacity of judge and advocate."[6]

Torres argues that when Morales stated the protection order might be a good idea and that the court advised Morales of the consequences of having a protection order issued, "[t]he court seemed to advocate that [Morales] change his mind . . . ."[7]

In *Sherman v. Sherman*,[8] the Court of Appeals addressed the trial judge's actions regarding a pro se petitioner. In that case, the petitioner applied for a domestic abuse protection order, but at the hearing, the court, sua sponte, asked the bailiff to retrieve a harassment protection order and stated that the petitioner wanted to amend her petition. The Court of Appeals held that

> when presented with a situation in which an ex parte domestic abuse protection order has been entered, but at the hearing, it becomes apparent that the matter may more properly be considered as a harassment protection order, the judge should explain the requirements for both domestic abuse and harassment protection orders and allow the petitioner to choose which theory to pursue.[9]

Similarly, there are times when trial judges must inform a party of the legal consequences of an order without directing the party's decision.

In this case, the court did not tell Morales whether to contest the protection order, it simply advised him of the consequences of the order. Torres' fourth assignment of error is without merit.

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[6] *Jim's, Inc. v. Willman*, 247 Neb. 430, 434, 527 N.W.2d 626, 630 (1995), *disapproved on other grounds, Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002).

[7] Brief for appellant at 17.

[8] *Sherman v. Sherman*, 18 Neb. App. 342, 781 N.W.2d 615 (2010).

[9] *Id.* at 347, 781 N.W.2d at 620.

Questions From Court.

In Torres' fifth assignment of error, she asserts that the district court erred in failing to inquire whether the actions of Morales caused her bodily injury or placed her in fear of bodily injury.

Under § 42-903(1), for the order to be issued, Torres needed to prove that Morales had subjected her to domestic abuse, defined as one or more of the following between household members: "(a) Attempting to cause or intentionally and knowingly causing bodily injury with or without a dangerous instrument; (b) Placing, by means of credible threat, another person in fear of bodily injury; [or] (c) Engaging in sexual contact or sexual penetration without consent as defined in section 28-318[.]"

The judge told Torres he was going to allow both witnesses an opportunity to give their side of the story for each of the incidents provided in the petition and affidavit. Aside from a few clarification questions, the judge allowed Torres to provide a narrative of each of the events. The judge similarly allowed Morales to provide a narrative of the events.

At one point, the judge asked Morales, "So on January 5th, I take it — I haven't heard from either one of you that there was any physical contact or threats of any nature made by anybody?" Even upon hearing this statement, Torres' counsel did not ask the court if he could question either Torres or Morales.

Torres does not cite any legal authority for the proposition that the judge was required to ask any certain question, rather than to allow her to provide, in narrative form, details for the events she felt warranted the order. Torres' counsel did not ask the court if he could ask additional questions of Torres. Furthermore, the questions suggested in Torres' brief—whether Torres was injured or placed in fear of injury—would not have been sufficient to warrant a protection order under § 42-903, because that section requires intentional injury or credible threats. Torres' fifth assignment of error is without merit.

Impartial Decisionmaker.

In Torres' sixth assignment of error, she argues that the totality of this case—questioning by the judge, advising Morales, failing to ask whether Torres was injured or put in fear of bodily injury, and taxing costs to Torres—indicates that Torres was denied an impartial decisionmaker.

[4,5] We have held, "[a] judge must be impartial, his or her official conduct must be free from even the appearance of impropriety, and a judge's undue interference in a trial may tend to prevent the proper presentation of the cause of action."[10] "[A] party alleging that a judge acted with bias or prejudice bears a heavy burden of overcoming th[e] presumption [of judicial impartiality]."[11]

Our analyses of the other assignments of error in this case do not support a finding of partiality. The judge had statutorily granted discretion to elect to question witnesses, and counsel did not request leave to ask any additional questions. The judge informed Morales of the legal consequences of the order without telling him how he should proceed in the case. The judge asked Torres to describe the events she felt warranted a protection order and was not required to ask whether she was injured or put in fear of bodily injury. Although the judge improperly taxed costs to Torres, this alone is not enough to overcome a presumption of impartiality. Torres' sixth assignment of error is without merit.

Protection Order.

In Torres' seventh assignment of error, she asserts that the district court erred in failing to issue a domestic abuse protection order based on the evidence presented in the case.

We have stated that even on de novo review, where the credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to

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[10] *Jim's, Inc. v. Willman, supra* note 6, 247 Neb. at 434, 527 N.W.2d at 630.

[11] *In re Interest of Jamyia M.*, 281 Neb. 964, 976, 800 N.W.2d 259, 268-69 (2011).

the circumstances that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.[12]

For the order to be issued, Torres would have needed to provide at least some evidence of abuse as defined under § 42-903(1). Based on her own testimony, the only bodily harm inflicted on Torres was what appears to have been an accidental elbowing—this certainly falls short of the "intentionally and knowingly" requirement of subsection (1)(a). Torres did not present any evidence that Morales threatened her as required by subsection (1)(b). And, finally, Torres did not present any evidence of any nonconsensual sexual contact as required by subsection (1)(c).

The district court did not err in failing to issue the protection order.

CONCLUSION

For the foregoing reasons, the order dismissing the cause is affirmed, but the portion of the order requiring Torres to pay the costs of the action is reversed.

AFFIRMED IN PART, AND IN PART REVERSED.

HEAVICAN, C.J., participating on briefs.

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[12] *Elstun, supra* note 1.

SOURCEGAS DISTRIBUTION LLC, A DELAWARE LIMITED LIABILITY COMPANY, APPELLANT, V. CITY OF HASTINGS, NEBRASKA, A MUNICIPAL CORPORATION, FOR AND ON BEHALF OF THE BOARD OF PUBLIC WORKS OF THE CITY OF HASTINGS, APPELLEE.

844 N.W.2d 256

Filed March 7, 2014. No. S-13-239.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law that an appellate court independently reviews.
2. ____: ____. Absent anything to the contrary, an appellate court will give statutory language its plain and ordinary meaning.

3. **Statutes: Legislature: Intent: Appeal and Error.** An appellate court will not look beyond a statute to determine the legislative intent when the words are plain, direct, or unambiguous.
4. **Statutes: Appeal and Error.** In construing statutory language, an appellate court attempts to give effect to all parts of a statute and to avoid rejecting a word, clause, or sentence as superfluous or meaningless.
5. ____: ____. An appellate court will not read into a statute a meaning that is not there.

Appeal from the District Court for Adams County: STEPHEN R. ILLINGWORTH, Judge. Affirmed.

Stephen M. Bruckner and Russell A. Westerhold, of Fraser Stryker, P.C., L.L.O., and Timothy Knapp, of SourceGas Distribution LLC, for appellant.

Michael E. Sullivan, of Sullivan Shoemaker, P.C., L.L.O., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

The City of Hastings, Nebraska, on behalf of the board of public works of the City of Hastings, had filed a petition in the county court for Adams County on January 15, 2013, seeking to initiate condemnation proceedings against property owned by SourceGas Distribution LLC that was located in an area that had been annexed by Hastings. Hastings brought its petition under the general condemnation procedures found at Neb. Rev. Stat. §§ 76-701 through 76-726 (Reissue 2009 & Cum. Supp. 2012) (chapter 76). In an effort to enjoin the county court proceedings, on January 22, in a separate matter, SourceGas Distribution filed a complaint for temporary and permanent injunction in the district court for Adams County, primarily alleging that Hastings must utilize Nebraska's Municipal Gas System Condemnation Act, Neb. Rev. Stat. §§ 19-4624 through 19-4645 (Reissue 2012) (Gas System Condemnation Act), rather than the procedures in chapter 76. The district court case gives rise to this appeal.

An evidentiary hearing was conducted on SourceGas Distribution's motion for temporary injunction, and on February 22, 2013, the district court filed an order overruling the motion for temporary injunction and dismissing the complaint. The district court concluded, inter alia, that § 19-4626(2) exempted Hastings from being required to proceed under the Gas System Condemnation Act and that Hastings could utilize the general condemnation procedures set forth in chapter 76. SourceGas Distribution appeals, assigning various errors. The district court stayed the condemnation proceedings pending this appeal. We conclude the district court correctly concluded that pursuant to § 19-4626(2), the Gas System Condemnation Act does not apply to this case, and that instead, chapter 76 applies. Finding no errors, we affirm.

STATEMENT OF FACTS

Hastings is located in Adams County and is a city of the first class as defined by Neb. Rev. Stat. § 16-101 (Reissue 2012). Hastings, by and through its board of public works, which is often referred to as "Hastings Utilities," owns and operates its own municipal utility system.

SourceGas Distribution is a Delaware limited liability company with its principal place of business located in Golden, Colorado. SourceGas Distribution provides retail natural gas distribution service throughout Adams County, except for certain areas served by Hastings.

On March 14, 2011, Hastings' city council adopted ordinance No. 4279 and thereby annexed an area east of Hastings, which primarily consisted of a community college campus. SourceGas Distribution owns easements, rights-of-way, natural gas pipelines, mains, distribution mains and lines, meters, measuring and regulating stations facilities, and appurtenances (gas facilities) in the area that was annexed. It is this collection of gas facilities which Hastings seeks to acquire through condemnation proceedings commenced in county court and to which SourceGas Distribution objects in its lawsuit filed in district court.

The record shows that on March 22, 2011, Hastings contacted SourceGas Distribution and commenced negotiations to

acquire SourceGas Distribution's gas facilities located in the annexed area; however, the negotiations were not successful and ended in December 2012. After the negotiations failed, on January 15, 2013, Hastings commenced condemnation proceedings by filing a petition styled "Petition for Appointment of Appraisers" in county court. See City of Hastings v. SourceGas Distribution, Adams County Court, case No. CI 13-86. By the petition, Hastings sought to acquire the gas facilities owned by SourceGas Distribution in the annexed area by utilizing the condemnation procedures set forth in chapter 76.

The petition stated that Hastings had determined the necessity of acquiring

> title and ownership to certain pipelines, mains, distribution mains and lines, meters, measuring and regulating stations, and other equipment and appurtenances, as well as any interests in real estate, including but not limited to fee simple title, easements, rights-of-way, licenses, and its customer accounts all owned by SourceGas Distribution, LLC or its affiliates, and all related to the distribution of natural gas . . . which are presently owned by [SourceGas Distribution]. This acquisition is being made in connection with a proposed project for the acquisition and/or installation of those Gas Facilities necessary to enable [Hastings] to furnish and distribute natural gas service to all natural gas customers located within an area recently annexed to the City of Hastings.

The petition further stated that Hastings sought to acquire "all of [SourceGas Distribution's] Gas Facilities located within the boundaries of that certain area which was annexed by the City of Hastings on March 14, 2011," and that the boundaries of the annexed area were described by legal description within the ordinance annexing the area, ordinance No. 4279, and the map attached thereto. A copy of ordinance No. 4279 and the map were attached to Hastings' petition.

On January 22, 2013, in the separate matter before us, SourceGas Distribution filed its "Complaint for Temporary and Permanent Injunction and Other Equitable Relief" in district court, generally alleging that Hastings is unlawfully attempting to condemn the gas facilities by proceeding under

the general condemnation procedures set forth in chapter 76. In the complaint, SourceGas Distribution specifically alleged that it was entitled to an injunction because the proper procedures that Hastings must utilize to condemn SourceGas Distribution's gas facilities are set forth in the Gas System Condemnation Act rather than in chapter 76. SourceGas Distribution also alleged in its complaint that Hastings failed to comply with § 76-704.01 because it failed to precisely describe in its county court petition the property sought to be condemned. SourceGas Distribution further alleged that Hastings failed to negotiate with SourceGas Distribution in good faith prior to commencing condemnation. Attached to SourceGas Distribution's complaint was a copy of a description of real property owned by SourceGas Distribution in the annexed area and a copy of Hastings' condemnation petition and its exhibits.

On the same date that SourceGas Distribution filed its complaint, it also filed a "Motion for Temporary Injunction" seeking to temporarily enjoin Hastings from condemning the gas facilities owned by SourceGas Distribution. A hearing was held on the motion on January 29, 2013. At the hearing, SourceGas Distribution offered and the district court received three affidavits, and Hastings offered and the district court received two affidavits. The district court granted the parties leave to file additional affidavits. Hastings offered three additional affidavits, including that of Lash Chaffin from the League of Nebraska Municipalities, describing, inter alia, his understanding of the relevance of the Gas System Condemnation Act. On February 12, SourceGas Distribution filed written objections to Chaffin's affidavit, based on hearsay, insufficient foundation, and relevance. On February 22, the district court received the three additional exhibits offered by Hastings, including Chaffin's affidavit.

On February 22, 2013, the district court filed its "Journal Entry and Order of Dismissal," in which it overruled SourceGas Distribution's motion for temporary injunction and dismissed SourceGas Distribution's complaint.

With respect to the applicable law, the district court rejected SourceGas Distribution's argument that Hastings must utilize

the procedures set forth in the Gas System Condemnation Act to condemn SourceGas Distribution's property. The centerpiece of the district court's conclusion as to the applicable statute was its determination that § 19-4626(2) exempts Hastings from proceeding under the Gas System Condemnation Act. Section 19-4626(2) provides: "Nothing in the act shall be construed to govern or affect the manner in which a city which owns and operates its own gas system condemns the property of a utility when such property is brought within the corporate boundaries of the city by annexation." The district court noted that Hastings owns its own gas system and had previously annexed the area in question.

With respect to the merits, the district court reasoned that SourceGas Distribution had not suffered and will not suffer irreparable harm due to the condemnation proceedings because the only harm SourceGas Distribution could suffer is financial, and under chapter 76, Hastings is obligated to compensate SourceGas Distribution for its loss. The district court further determined that SourceGas Distribution did not have a clear right to the relief it sought and that it is not against the public interest for Hastings to utilize the condemnation procedures under chapter 76. The district court did not directly address the issue of whether the property was adequately described in the condemnation petition. Based on the above reasoning, the district court overruled SourceGas Distribution's motion for temporary injunction, stated that it is "obvious [SourceGas Distribution] would not succeed on the merits of its complaint," and dismissed its complaint.

SourceGas Distribution appeals. The district court stayed the condemnation proceedings pending this appeal.

ASSIGNMENTS OF ERROR

SourceGas Distribution assigns on appeal, restated, that the district court generally erred when it denied SourceGas Distribution's motion for temporary injunction and dismissed its complaint. SourceGas Distribution specifically claims that the district court erred when it concluded that chapter 76 and not the Gas System Condemnation Act was applicable to the condemnation of the gas facilities. SourceGas Distribution also

claims the district court erred when it failed to find that the description of the property to be appraised in the county court matter was inadequate and when it received Chaffin's affidavit into evidence.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law that an appellate court independently reviews. *In re Estate of Odenreider*, 286 Neb. 480, 837 N.W.2d 756 (2013).

ANALYSIS

[2-5] Because its reading of § 19-4626(2) of the Gas System Condemnation Act was fundamental to the district court's resolution of the case, we are asked on appeal to construe § 19-4626(2). We begin by turning to the familiar canons of statutory construction. Absent anything to the contrary, an appellate court will give statutory language its plain and ordinary meaning. *Strasburg v. Union Pacific RR. Co.*, 286 Neb 743, 839 N.W.2d 273 (2013). We will not look beyond a statute to determine the legislative intent when the words are plain, direct, or unambiguous. *Fisher v. PayFlex Systems USA*, 285 Neb. 808, 829 N.W.2d 703 (2013). In construing statutory language, we attempt to give effect to all parts of a statute and to avoid rejecting a word, clause, or sentence as superfluous or meaningless. See *id*. Likewise, we will not read into a statute a meaning that is not there. *Blakely v. Lancaster County*, 284 Neb. 659, 825 N.W.2d 149 (2012). Based on these principles and given our independent reading of the plain language of § 19-4626(2) discussed below, we need not refer to the substance of Chaffin's affidavit in the resolution of this case. The admission of Chaffin's affidavit, if error, was harmless. See *Simon v. Drake*, 285 Neb. 784, 792, 829 N.W.2d 686, 692 (2013) (stating that "[i]n a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party"). Therefore, we determine that SourceGas Distribution's assignment of error regarding the admission of Chaffin's affidavit is without merit.

Chapter 76 ordinarily applies to condemnation proceedings, and the general condemnation procedures found in chapter 76 apply unless there are more specific statutes that will govern the condemnation proceedings. Section 76-703 provides that if the condemnation proceedings will result in a decrease in the condemnee's territory or volume of service, then the determination of damages shall be determined pursuant to the more specific statutes rather than the damage provisions found in chapter 76, if those other statutes apply to the condemnation at issue. Section 76-703 provides:

> Damages to be paid by the condemner for any property including parts of or easements across rights-of-way of a public utility or a railroad taken through the exercise of the power of eminent domain shall be ascertained and determined as provided in sections 76-704 to 76-724, except that if it is sought to condemn the property, or such part thereof as will result in a decrease in the territory or volume of service, of a public utility engaged in the rendition of existing service, such damages shall be ascertained and determined as provided in sections 19-701 to 19-707 [pertaining to waterworks, electric utilities, and railways] and 70-650 [pertaining to electric distribution systems] or the . . . Gas System Condemnation Act, when applicable.

SourceGas Distribution contends that because the condemnation proceedings by Hastings will result in a decrease of SourceGas Distribution's territory or volume of service, one of the specific statutes listed in § 76-703, rather than chapter 76, shall apply to the determination of damages. We disagree. In this regard, we note that § 76-703 provides that damages shall be ascertained under one of the more specific statutes instead of chapter 76 only "when [those other statutes are] applicable"—a determination made by reference to the provisions of those other statutes.

Sections 19-701 through 19-707 and Neb. Rev. Stat. § 70-650 (Reissue 2009) are mentioned in § 76-703 and are not applicable to the facts of this case. Section 70-650 applies to electric distribution systems. Sections 19-701 through 19-707

set forth condemnation procedures regarding "any waterworks, waterworks system, electric light plant, electric light and power plant, heating plant, street railway, or street railway system." § 19-701. Although gas systems were formerly governed by §§ 19-701 through 19-707, in 2002, the Legislature adopted 2002 Neb. Laws, L.B. 384, creating the Gas System Condemnation Act, thus removing gas systems from §§ 19-701 through 19-707.

Continuing our examination of § 76-703, we note that the Gas System Condemnation Act is mentioned therein, but as explained below, we conclude, as did the district court, that the Gas System Condemnation Act is not applicable to the condemnation procedure and determination of damages in this case. Generally, a city may acquire and appropriate a gas system through eminent domain by following the procedures set forth in the Gas System Condemnation Act. See § 19-4625. However, § 19-4626 sets forth exceptions identifying circumstances when the Gas System Condemnation Act will not apply to a gas system condemnation. Section 19-4626(2), provides: "Nothing in the act shall be construed to govern or affect the manner in which a city which owns and operates its own gas system condemns the property of a utility when such property is brought within the corporate boundaries of the city by annexation." Therefore, § 19-4626(2) provides that the Gas System Condemnation Act does not apply when a city owns and operates its own gas system and the property that is being condemned is within the corporate boundaries of the city by annexation.

In this case, it is not disputed that Hastings owns and operates its own gas system, and the property consisting of gas facilities owned by SourceGas Distribution that are at issue are located in an area that was brought within the corporate boundaries of Hastings by annexation. The language of § 19-4626(2) is unambiguous, and we will give the language its plain and ordinary meaning. *Strasburg v. Union Pacific RR. Co.*, 286 Neb. 743, 839 N.W.2d 273 (2013). Under the plain language of § 19-4626(2), we conclude the district court was correct when it determined that pursuant to § 19-4626(2), the

Gas System Condemnation Act does not apply to this case, and that instead, the general condemnation procedures set forth in chapter 76 apply.

Despite the plain language of § 19-4626(2), SourceGas Distribution asserts that because of differing language between § 19-4626(1) and (2), the exception found at § 19-4626(2) does not apply to this case. SourceGas Distribution reasons that the gas facilities which Hastings seeks to condemn are part of a gas system and that § 19-4626(2) exempts only property that is not part of a gas system. We disagree with SourceGas Distribution's reading of these provisions.

SourceGas Distribution points to § 19-4626(1), which provides:

> A city may condemn *the property of a utility which constitutes a portion of a gas system* without complying with the . . . Gas System Condemnation Act if the condemnation is necessary for the public purpose of acquiring an easement or right-of-way across the property of the utility or is for the purpose of acquiring a portion of the gas system for a public use unrelated to the provision of natural gas service.

(Emphasis supplied.)

SourceGas Distribution contends that the phrase "the property of a utility which constitutes a portion of a gas system" in § 19-4626(1) differs from the phrase "the property of a utility" in § 19-4626(2) and that by using these differing phrases, the Legislature intended the phrase "the property of a utility" in § 19-4626(2) to cover only property that is not "a portion of a gas system." Under the view of SourceGas Distribution, chapter 76 would apply to property that is not a portion of the gas system, but the Gas System Condemnation Act would apply to property that is a portion of a gas system. Applying its interpretation of the statutes, SourceGas Distribution thus contends that the exception in § 19-4626(2) does not exempt Hastings from following the procedures of the Gas System Condemnation Act in this case in which Hasting seeks to condemn the gas facilities at issue, because the gas facilities are in fact a portion of a gas system and § 19-4626(2) does

not exempt such property from application of the Gas System Condemnation Act.

We believe that the difference in the phrases used in § 19-4626(1) and (2) is not meaningful, and we reject SourceGas Distribution's argument. We understand the phrase "the property of a utility" in § 19-4626(2) to include the real and personal property of a utility, and therefore, this phrase anticipates the current case where Hastings is seeking to condemn gas facilities owned by SourceGas Distribution. There is no need to characterize such property as being or not being a portion of a gas system.

The district court essentially determined that Hastings was properly proceeding in county court under chapter 76 and that SourceGas Distribution was not going to succeed on its complaint. We agree with the district court's assessment of the record. Thus, the district court did not err when it denied SourceGas Distribution's motion for temporary injunction and dismissed its complaint.

SourceGas Distribution also claims on appeal that the district court erred in its treatment of its claim challenging the sufficiency of the description of the property that Hastings sought to be appraised in the county court matter. The district court did not explicitly address the issue of the sufficiency of the description in its February 22, 2013, order. We agree with the district court that it is premature to address this issue in this case. Thus, we find no error in this regard and we do not comment on the sufficiency of the description. See *Brodine v. State*, 180 Neb. 433, 143 N.W.2d 361 (1966) (in matter which commenced in county court, affirming district court's order affirming appraisers' award and finding that description of property in pleading and accompanying map were sufficiently accurate).

CONCLUSION

We find no merit to the assigned errors. The district court correctly concluded that pursuant to the exception set forth in § 19-4626(2), the Gas System Condemnation Act does not apply and, instead, the general condemnation procedures of

chapter 76 apply. This determination of law controls the outcome of this case, and we therefore determine that the district court did not err when it denied SourceGas Distribution's motion for temporary injunction and dismissed its complaint.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
DANNY R. ROBINSON, JR., APPELLANT.
843 N.W.2d 672

Filed March 7, 2014. No. S-13-306.

1. **Jurisdiction: Appeal and Error.** An appellate court determines a jurisdictional question that does not involve a factual dispute as a matter of law.
2. **Postconviction: Appeal and Error.** In appeals from postconviction proceedings, an appellate court independently resolves questions of law.
3. **Effectiveness of Counsel: Appeal and Error.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
4. **Postconviction: Final Orders.** Within a postconviction proceeding, an order granting an evidentiary hearing on some issues and denying a hearing on others is a final order as to the claims denied without a hearing.
5. **Postconviction.** The Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008), provides that postconviction relief is available to a prisoner in custody under sentence who seeks to be released on the ground that there was a denial or infringement of his constitutional rights such that the judgment was void or voidable.
6. **Constitutional Law: Effectiveness of Counsel.** A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial.
7. **Effectiveness of Counsel: Proof: Appeal and Error.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. A court may address the two prongs of this test, deficient performance and prejudice, in either order.
8. **Effectiveness of Counsel: Proof: Words and Phrases.** In addressing the "prejudice" component of the test in *Strickland v. Washington*, 466 U.S. 668, 104 S.

Ct. 2052, 80 L. Ed. 2d 674 (1984), a court focuses on whether a trial counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. To show prejudice under the prejudice component of the *Strickland* test, there must be a reasonable probability that but for the deficient performance, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

9. **Trial: Effectiveness of Counsel: Witnesses.** The decision to call, or not to call, a particular witness, made by counsel as a matter of trial strategy, even if that choice proves unproductive, will not, without more, sustain a finding of ineffectiveness of counsel.

Appeal from the District Court for Douglas County: THOMAS A. OTEPKA, Judge. Affirmed.

Michael J. Wilson and Jessica P. Douglas, of Schaefer Shapiro, L.L.P., for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

Danny R. Robinson, Jr., appeals the February 18, 2010, order of the district court for Douglas County in which the court denied his motion for postconviction relief after holding an evidentiary hearing. The evidence received at the hearing pertained to Robinson's allegation that he had received ineffective assistance of counsel. Robinson sought relief with respect to his convictions for first degree murder, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a felon. We affirm the denial of Robinson's motion for postconviction relief.

STATEMENT OF FACTS

Robinson was convicted of first degree murder, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a felon in connection with the 2001 shooting death of Daniel Lockett. The theory of the State's case was that Lockett was murdered in retaliation for the previous murder

of Terez Reed and that Lockett was shot by two individuals, Robinson and Dupree Reed. The theories of the defense included the assertion that Terrell Reed and not Robinson was one of the shooters. Robinson was sentenced to life imprisonment without parole on the murder conviction and to two consecutive sentences of 5 to 10 years' imprisonment on the use and possession convictions. On direct appeal, we affirmed Robinson's convictions on all three counts and his sentences for the use and possession convictions. But because the "without parole" feature of the murder sentence was not authorized by statute, we vacated the sentence of life imprisonment "without parole" on the murder conviction and remanded the cause with directions to the trial court to resentence Robinson to life imprisonment. *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006). A further description of the evidence surrounding the shooting of Lockett is detailed in our opinion on direct appeal. See *id.*

In March 2008, Robinson filed a motion for postconviction relief in which he made numerous claims of ineffective assistance of trial counsel. The State moved the court to deny postconviction relief without an evidentiary hearing. After a hearing on the State's motion, the court entered an order on March 16, 2009, in which it denied some of Robinson's claims without an evidentiary hearing but granted an evidentiary hearing with respect to other claims. Robinson did not timely file a notice of appeal from the denial of claims contained in the March 16 order.

The denial of claims in the March 16, 2009, order was based on the district court's determinations that the claims were mere conclusions of fact or law, were unsupported by the record, failed to allege how the outcome of the trial would have been different, or failed to allege how they constituted a denial of Robinson's constitutional rights. The court described those claims that it was denying without an evidentiary hearing as claims that trial counsel was ineffective with regard to (1) evidence related to gang affiliation and change of venue, (2) admission of shell casings, (3) jury selection, (4) admission of photographs, (5) statements of a witness regarding a potential alternate suspect, (6) evidence of an arson and a trip to Texas,

(7) records of a telephone conversation, (8) criminal history of a codefendant, and (9) statements of the prosecutor during closing arguments.

In the March 16, 2009, order, the court granted an evidentiary hearing limited to certain other issues. It described those issues as claims that trial counsel provided ineffective assistance because counsel (1) did not allow Robinson to testify in his own defense and (2) did not call certain specified persons as witnesses.

A hearing on these issues was held on December 11, 2009. At the hearing, the court received into evidence the depositions of Robinson and Robinson's trial counsel; the court also took notice of the file and transcript of Robinson's trial. The court filed an order on February 18, 2010, in which it denied these claims for postconviction relief. The court concluded Robinson had failed to show that counsel's performance was deficient. The court also stated that even if deficient performance had been proved, Robinson had failed to establish prejudice.

With regard to Robinson's claim that trial counsel provided ineffective assistance when counsel did not allow Robinson to testify in his own defense, the postconviction court noted a conflict between Robinson's deposition testimony and his trial counsel's deposition testimony. Robinson stated that he told his counsel on two or three occasions that he wanted to testify at trial but that counsel never visited Robinson to discuss whether or not he should testify. Counsel stated to the contrary and provided some details. Counsel testified that he had visited Robinson in jail a number of times prior to trial; that he had explained to Robinson he had the right to testify at trial; that as part of trial strategy, he advised Robinson not to testify; and that it was ultimately Robinson's decision not to testify. The postconviction court found counsel's recollection to be more persuasive and concluded that Robinson had failed to prove that counsel's performance was deficient.

With regard to Robinson's claim that trial counsel provided ineffective assistance when counsel failed to call several people as witnesses, the postconviction court noted that, with respect to each of the nine witnesses identified by Robinson,

trial counsel in his deposition had provided an "explanation as to each and every one of them, why he decided, in his best judgment, not to call them." The court determined that counsel had "provided more than a satisfactory explanation as to the reasons in his considered judgment he elected not to call these witnesses." The court concluded that, because trial counsel decided not to call each of the witnesses as a matter of trial strategy or because the witnesses' testimony would have been inadmissible or cumulative, Robinson failed to show that counsel's performance was deficient.

Having reviewed the files and record, the postconviction court further concluded that even if deficient performance had been shown, Robinson had failed to show any prejudice resulting from counsel's alleged deficient performance. In its February 18, 2010, order, the court noted this court's opinion in the direct appeal in which we referred to testimony by witnesses that amply supported Robinson's convictions, thus comporting with its view that Robinson was not prejudiced by trial counsel's purported failure to call these witnesses.

On May 4, 2011, Robinson filed a pro se motion that he titled as a second motion for postconviction relief. In the motion, he alleged, inter alia, that he was denied his right to appeal the February 18, 2010, order denying his first motion for postconviction relief because of the official negligence of the clerk of the district court. By this pleading, Robinson in effect sought reinstatement of his appeal. The district court denied Robinson's second motion for postconviction relief because it reasoned that a postconviction action was not the appropriate vehicle to request a reinstatement of the appeal from the denial of an earlier postconviction motion.

Robinson appealed the denial of his second motion for postconviction relief to this court. In a memorandum opinion filed November 26, 2012, in case No. S-11-1112, we determined that although Robinson's motion was titled as a postconviction action, it included a request for reinstatement of his appeal due to official negligence, a claim cognizable under Nebraska law. We concluded that the district court erred when it did not consider Robinson's motion as one seeking to reinstate his appeal. We therefore reversed the denial of the

motion and remanded the cause to the district court to consider the motion.

On remand and following an evidentiary hearing, the district court on April 1, 2013, found that Robinson's notice of appeal from the February 18, 2010, order had been lost due to official negligence and not due to Robinson's actions. Therefore, under its nunc pro tunc power, the court reinstated the appeal from the district court's February 18 order.

This is Robinson's appeal from the February 18, 2010, order in which the district court denied his first motion for postconviction relief after an evidentiary hearing.

ASSIGNMENTS OF ERROR

Robinson claims that the district court erred when it rejected certain of his claims of ineffective assistance of counsel and that the cumulative effect of the asserted instances of ineffective assistance resulted in a trial that was not fair.

Robinson specifies certain claims with respect to which the court erred. Two of the claims were claims that the court denied without an evidentiary hearing in the March 16, 2009, order; they were the claims that counsel was ineffective with respect to (1) the statements of a witness regarding a potential alternate suspect and (2) statements of the prosecutor during closing arguments. The remaining assignments of error pertain to claims that the court considered at the evidentiary hearing and rejected in the February 18, 2010, order; they were claims that counsel was ineffective for failing to call five certain witnesses. Robinson does not appeal the district court rulings in its February 18 order regarding four other witnesses or regarding trial counsel's purported failure to permit Robinson to testify.

STANDARDS OF REVIEW

[1,2] An appellate court determines a jurisdictional question that does not involve a factual dispute as a matter of law. *State v. Timmens*, 282 Neb. 787, 805 N.W.2d 704 (2011). In appeals from postconviction proceedings, we independently resolve questions of law. *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012).

[3] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. *Timmens, supra*. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. *Id*. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision. *Timmens, supra*.

ANALYSIS

Robinson Did Not Timely Appeal the March 16, 2009, Order in Which the Court Denied Certain Claims Without an Evidentiary Hearing; We Therefore Do Not Consider Robinson's Assignments of Error Related to Those Claims in This Appeal.

We first note that two of the claims to which Robinson assigns error in this appeal were among those claims the district court denied without an evidentiary hearing in its March 16, 2009, order. The claims denied without an evidentiary hearing in the March 16 order included the claims that counsel was ineffective with respect to (1) the statements of a witness regarding a potential alternate suspect and (2) statements of the prosecutor during closing arguments. Robinson did not file a notice of appeal within 30 days after March 16 with respect to the denial of these two claims, and as a result, we do not review the assignments of error related to the denial of these two claims in this appeal.

[4] We have stated that within a postconviction proceeding, an order granting an evidentiary hearing on some issues and denying a hearing on others is a final order as to the claims denied without a hearing. *State v. Alfredson, ante* p. 477, 842 N.W.2d 815 (2014); *Timmens, supra*. An order denying an evidentiary hearing on a postconviction claim is a final judgment as to that claim, and under Neb. Rev. Stat. § 25-1912 (Reissue 2008), a notice of appeal must be filed with regard to such a claim within 30 days.

We note that in his request for reinstatement of his appeal, Robinson made no assertion that he attempted to file a notice of appeal from the March 16, 2009, order or that such a notice was lost due to official negligence. Robinson's request for reinstatement of appeal due to official negligence, and the relief granted by the district court upon such request after remand in the form of the present appeal, related only to the notice of appeal from the February 18, 2010, order. Our jurisdiction in this appeal extends only to those assignments of error related to claims that were denied in the February 18 order.

We do not have jurisdiction in this appeal to consider assignments of error related to claims involving a witness regarding a potential alternate suspect or statements of the prosecutor during closing, which claims were denied without an evidentiary hearing in the March 16, 2009, order from which a timely appeal was not sought.

The District Court Did Not Err When It Denied Other Claims After an Evidentiary Hearing.

The remaining claims with regard to which Robinson assigns error in this appeal were denied in the February 18, 2010, order following the evidentiary hearing. We have jurisdiction to consider those claims in this appeal. Following our independent review, we conclude that the district court did not err when it concluded that the claims were without merit, and we therefore affirm the February 18 order denying Robinson's claims for postconviction relief.

As an initial matter, we note that Robinson does not assign error to the denial of certain claims in the February 18, 2010, order following the evidentiary hearing. The claims regarding which Robinson does not assign error include the claim that counsel was ineffective for failing to present Robinson's testimony in his own defense. In addition, Robinson does not assign error with respect to certain of the witnesses that he claimed counsel was ineffective for failing to call.

[5,6] Robinson sought postconviction relief with respect to his claims of ineffective assistance of counsel. The Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue

2008), provides that postconviction relief is available to a prisoner in custody under sentence who seeks to be released on the ground that there was a denial or infringement of his constitutional rights such that the judgment was void or voidable. *State v. Molina*, 279 Neb. 405, 778 N.W.2d 713 (2010); *State v. York*, 278 Neb. 306, 770 N.W.2d 614 (2009). A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial. See *State v. Robinson*, 285 Neb. 394, 827 N.W.2d 292 (2013).

[7,8] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. *Robinson, supra*. A court may address the two prongs of this test, deficient performance and prejudice, in either order. *Id*. In addressing the "prejudice" component of the *Strickland* test, a court focuses on whether a trial counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. *Robinson, supra*. To show prejudice under the prejudice component of the *Strickland* test, there must be a reasonable probability that but for the deficient performance, the result of the proceeding would have been different. See *Robinson, supra*. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*.

Although Robinson alleged that counsel was ineffective for failing to call nine witnesses, on appeal, he assigns error with regard to the district court's rulings as to only five witnesses: Darrell Kellogg; Antone Green; Keelan Washington; Denesha Lockett; and Jasmine Harris. The testimonies of these five witnesses would have included tangential matters, such as whether a possible witness was fearful of testifying, and nonrelevant matters, such as the whereabouts of an individual on the night of the shooting when said individual did not testify at trial. With respect to each of the five witnesses, trial counsel explained at the evidentiary hearing why calling each of the witnesses would not have served trial strategy. Counsel

explained that each witness' proposed testimony was either not germane or not important or became unnecessary because of trial developments.

[9] We have stated that the decision to call, or not to call, a particular witness, made by counsel as a matter of trial strategy, even if that choice proves unproductive, will not, without more, sustain a finding of ineffectiveness of counsel. *State v. Thomas*, 278 Neb. 248, 769 N.W.2d 357 (2009) (quoting *State v. Lindsay*, 246 Neb. 101, 517 N.W.2d 102 (1994)). Because counsel in this case gave meaningful reasons why the specific witnesses did not serve trial strategy, following our independent review, we agree with the district court's conclusion that Robinson did not show deficient performance.

With respect to prejudice, the district court concluded that Robinson did not establish the second prong of the *Strickland* test, because he could not show prejudice from counsel's purported failure to call the specified witnesses. To show prejudice under the *Strickland* test, the defendant must show a reasonable probability that but for the alleged deficient performance, the result of the proceeding would have been different. See *State v. Robinson*, 285 Neb. 394, 827 N.W.2d 292 (2013). Following our independent review, we agree with the district court that Robinson did not show prejudice.

In Robinson's direct appeal, following our evaluation of certain evidentiary rulings which we determined were error, we conducted a harmless error review and concluded that the guilty verdicts against Robinson were surely unattributable to the erroneous rulings. *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006). The theory of the State's case against Robinson was that there were two shooters, one of whom was Robinson, and that after the crimes, Robinson fled to Texas in a green Chevrolet Tahoe, where the vehicle was destroyed. In our opinion on direct appeal, we stated that "[t]he State's case was largely based upon . . . three witnesses who testified about the shooting." *Robinson*, 271 Neb. at 731, 715 N.W.2d at 560. The testimony of these witnesses, which was apparently deemed credible by the jury, supported the State's theory of the case and Robinson's convictions.

In our opinion on Robinson's direct appeal, we summarized the testimony of these three witnesses and other evidence as follows:

> Dupree Reed testified that he participated directly in the shooting by firing his .22-caliber automatic pistol into the house in which Daniel Lockett was shot. He testified that Robinson had stated he thought Gary Lockett murdered Terez Reed. Dupree Reed testified that he and Robinson had driven in Robinson's green Tahoe to a residence where Robinson thought Gary Lockett would be present and that Robinson shot through the window of the house.
>
> Courtney Nelson testified regarding the incident. Nelson said Robinson told him that he thought Gary Lockett killed Terez Reed and that Gary Lockett was affiliated with a rival gang. When Robinson got in the Tahoe to leave the funeral reception, Nelson saw him pull out a 9-mm pistol. James Edwards also testified to his observations of Robinson on the night Daniel Lockett was shot. After Robinson and Dupree Reed fired their guns into the residence, Edwards saw Robinson return to the Tahoe with his 9-mm pistol, and the appearance of the weapon indicated that all rounds had been fired.
>
> Nelson further testified that after Daniel Lockett's murder, Robinson stated he was taking the Tahoe to Kansas or Texas to "get rid of the truck." A police officer in Kansas City observed Robinson getting off a bus from Houston and Robinson told the officer he was returning to Omaha. Evidence also showed that a green Tahoe belonging to Robinson's grandmother was found destroyed in a vacant field in Houston.

Robinson, 271 Neb. at 731-32, 715 N.W.2d at 560-61.

In the present appeal from the denial of postconviction relief, we again reviewed the record, which includes the foregoing evidence. Although our review in this postconviction case differs from our harmless error review on direct appeal, we nevertheless again find Robinson's arguments unavailing. Given the powerful direct evidence that we summarized in the direct appeal and have repeated above, we conclude that

Robinson did not show a reasonable probability that the purported testimony of the five witnesses trial counsel allegedly failed to call would have caused a different result at the trial. Robinson therefore did not show prejudice from counsel's alleged deficient performance in this postconviction appeal.

We further note that Robinson contends that the cumulative result of the alleged instances of ineffective assistance of counsel resulted in an unfair trial requiring postconviction relief. However, because we conclude that each of Robinson's individual claims was without merit, we further conclude that the cumulative effect of such claims did not result in an unfair trial and does not merit postconviction relief.

CONCLUSION

We determine that, because Robinson failed to take a timely appeal, we lack jurisdiction in this appeal to consider Robinson's assignments of error related to claims which the district court denied without an evidentiary hearing in the order entered March 16, 2009. With regard to Robinson's assignments of error related to claims which the district court denied after an evidentiary hearing in the order entered February 18, 2010, following our independent review, we conclude that the district court did not err when it concluded that such claims were without merit and denied Robinson's motion for postconviction relief.

AFFIRMED.

HEAVICAN, C.J., participating on briefs.

JEREMIAH J., APPELLEE, V.
DAKOTA D., APPELLANT.
843 N.W.2d 820

Filed March 7, 2014. No. S-13-478.

1. **Appeal and Error.** An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.
2. **Adoption: Appeal and Error.** Appeals in adoption proceedings are reviewed by an appellate court for error appearing on the record.

3. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. **Evidence: Appeal and Error.** Where credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give great weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
5. **Constitutional Law: Parental Rights.** The interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by the U.S. Supreme Court.
6. **Parental Rights: Adoption.** The foundation of Nebraska's adoption statutes is the consent of a biological parent to the termination of his or her parental rights.
7. **Parental Rights: Paternity: Adoption.** In order to terminate a father's rights through an adoption procedure, the consent of the adjudicated father of a child born out of wedlock is required for the adoption to proceed unless the Nebraska court having jurisdiction over the custody of the child determines otherwise, pursuant to Neb. Rev. Stat. § 43-104.22 (Reissue 2008).
8. **Parental Rights: Paternity: Proof.** Because Neb. Rev. Stat. § 43-104.22 (Reissue 2008) can effectively terminate the parental rights of a father, the exceptions under § 43-104.22 must be proved by clear and convincing evidence.
9. **Abandonment: Words and Phrases.** Willful abandonment has been defined as a voluntary and intentional relinquishment of the custody of the child to another, with the intent to never again claim the rights of a parent or perform the duty of a parent; or, second, an intentional withholding from the child, without just cause or excuse, by the parent, of his presence, his care, his love and his protection, maintenance, and the opportunity for the display of filial affection.
10. **Abandonment: Intent.** The question of abandonment is largely one of intent to be determined in each case from all the facts and circumstances.
11. **Abandonment: Intent: Evidence.** Evidence of a parent's conduct is relevant to a determination of whether the purpose and intent of that parent was to abandon the child.
12. **Adoption: Abandonment: Proof.** The issue of abandonment in an adoption proceeding must be established by clear and convincing evidence.
13. **Parental Rights: Words and Phrases.** Parental unfitness in the context of termination of parental rights cases is a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which caused, or probably will result in, detriment to a child's well-being.
14. **Parental Rights: Proof.** Parental unfitness in the context of termination of parental rights cases must be proved by clear and convincing evidence.

Appeal from the County Court for Hall County: PHILIP M. MARTIN, JR., Judge. Affirmed.

Marvin L. Andersen, of Bradley, Elsbernd, Andersen, Kneale & Mues Jankovitz, P.C., for appellant.

Mark Porto, of Shamberg, Wolf, McDermott & Depue, for appellee.

Heavican, C.J., Wright, Connolly, Stephan, McCormack, Miller-Lerman, and Cassel, JJ.

McCormack, J.

NATURE OF CASE

This appeal asks us to determine whether Jeremiah J.'s consent is required before Dakota D. can place their minor child, born out of wedlock, up for adoption. Upon remand from the first appeal presented to this court[1] and after a subsequent bench trial, the county court found that Jeremiah's consent to any proposed adoption of the minor child was required. Dakota now appeals that finding.

BACKGROUND

Dakota wants to place her child up for adoption. Jeremiah, the unwed biological father, filed an "Amended Petition to Establish Necessity of Father's Consent to Adoption" with the county court in an attempt to prevent the adoption proceedings. The county court granted Dakota's motion for summary judgment, because it determined that Jeremiah did not comply with the statutory requirement under Neb. Rev. Stat. § 43-104.02 (Reissue 2008) that an objection must be filed within 5 business days of the child's birth. Jeremiah appealed.

On appeal, we reversed, and remanded the cause for further proceedings.[2] We found that a material issue of fact existed as to whether Dakota was estopped from relying upon § 43-104.02 for intentionally misleading Jeremiah about the child's date of birth to prevent him from complying with the requirements of § 43-104.02.

Evidence Presented at Trial

On remand, the county court held a bench trial. An exhibit was admitted into evidence which contained the bill of exceptions from the May 1, 2012, summary judgment hearing.

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[1] *Jeremiah J. v. Dakota D.*, 285 Neb. 211, 826 N.W.2d 242 (2013).

[2] *Id.*

Additionally, both parties stipulated that the circumstances had not changed from May 1, with the exception of the testimony offered at trial by Jeremiah and Dakota.

Jeremiah and Dakota dated from 2008 to 2011. In June 2011, shortly after she became aware of her pregnancy, Dakota told Jeremiah that she was pregnant. However, following an argument, Dakota told Jeremiah that he was not the father and that she did not want Jeremiah to have anything to do with the pregnancy.

In October 2011, Dakota told an adoption agency that Jeremiah was the biological father of the child. A caseworker with the agency called Jeremiah in November to inform him that he was identified as the biological father by Dakota. She informed him that Dakota wanted to place the child up for adoption.

Jeremiah visited with the caseworker in person on November 30, 2011. She gave Jeremiah a letter informing him of his rights to object to the adoption and the procedures he needed to follow. At that time, Jeremiah told the caseworker that he opposed the adoption.

The child was born on February 9, 2012. On February 13, Jeremiah and Dakota briefly talked on the telephone. Dakota did not tell Jeremiah that the child had already been born. At the summary judgment hearing, she explained that she did not tell him that the child had been born, because she did not want him to know about the child's birth during the time he had to object to the adoption.

At the summary judgment hearing on May 1, 2012, Jeremiah testified that he wanted to have an active role in the life of the child. He admitted that he had not yet provided financial assistance for the child. However, during oral argument, Dakota's counsel conceded that Dakota never asked Jeremiah for financial assistance.

Jeremiah lives with his parents. He testified that he was working full time earning $12.50 per hour and had saved $2,000 in anticipation of the child's birth. Jeremiah's father testified that the entire family was supportive of Jeremiah and that the family would be available to provide whatever support Jeremiah needed in raising the child.

Jeremiah has been convicted of driving under suspension, obstructing an officer, and trespassing. He testified that he had also been charged with, but not convicted of, theft, criminal mischief, and trespassing. During direct examination, Jeremiah was not completely forthcoming about his charges and convictions.

Dakota's testimony from the summary judgment hearing indicated that she was worried about Jeremiah's fitness to raise the child. She alleged that Jeremiah smoked marijuana daily and that he admitted to snorting cocaine. Dakota testified that she felt threatened by Jeremiah because he would often yell at her and call her names. Dakota's current significant other also testified to the verbal abuse and threatening language. Dakota explained that in December 2008, Jeremiah put Dakota on the bed, grabbed her wrists, and gave her a "black lip" with his elbow. Dakota testified that she did not contact the police after that incident. Under oath, Jeremiah denied all drug use, verbal abuse, and physical abuse.

At trial, Jeremiah and Dakota again briefly testified. Both confirmed that Jeremiah had not given any financial support to the child since the previous hearing. Jeremiah testified that he has spent some of the $2,000 he had saved, but that he still had over $1,000 saved for the support of the child. He reiterated it was his intent to seek custody of the child.

County Court's Order

The county court found that Dakota intentionally hid the child's birth from Jeremiah. Therefore, Dakota was equitably estopped from relying on the 5-day time limit for objections. Additionally, Dakota could not rely on the procedural exceptions to requiring consent found under subparagraphs (7) and (8) of Neb. Rev. Stat. § 43-104.22 (Reissue 2008).

The county court held that Jeremiah's consent to any proposed adoption of the minor child is required. It stated that "[w]hile it is clear that [Jeremiah] has not provided support to the child either during pregnancy or since birth given the conduct of [Dakota] the court cannot find that [Jeremiah's] lack of response was unreasonable." Dakota now appeals that finding.

ASSIGNMENT OF ERROR

Dakota assigns only that the county court erred when it concluded that Jeremiah's consent is required for the proposed adoption of the minor child, because exceptions under § 43-104.22 apply.

[1] Although Dakota's assignments of error state that all of the exceptions under § 43-104.22 apply, her brief clarifies that subparagraphs (6), (7), (8), (9), (10), and (11) are not applicable to this appeal and will not be argued. An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.[3] Therefore, we will address only the first five subparagraphs of § 43-104.22.

STANDARD OF REVIEW

[2,3] Appeals in adoption proceedings are reviewed by an appellate court for error appearing on the record.[4] When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[5]

[4] Where credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give great weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.[6]

ANALYSIS

[5-8] The interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by the U.S. Supreme Court.[7]

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[3] *State v. Ely, ante* p. 147, 841 N.W.2d 216 (2014).

[4] *Carlos H. v. Lindsay M.*, 283 Neb. 1004, 815 N.W.2d 168 (2012).

[5] *Id.*

[6] *Caniglia v. Caniglia*, 285 Neb. 930, 830 N.W.2d 207 (2013).

[7] See *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).

Recognizing these constitutional interests, the foundation of Nebraska's adoption statutes is the consent of a biological parent to the termination of his or her parental rights.[8] In particular, in order to terminate a father's rights through an adoption procedure, the consent of the adjudicated father of a child born out of wedlock is required for the adoption to proceed unless the Nebraska court having jurisdiction over the custody of the child determines otherwise, pursuant to § 43-104.22.[9] Section 43-104.22 states in part:

> At any hearing to determine the parental rights of an adjudicated biological father or putative biological father of a minor child born out of wedlock and whether such father's consent is required for the adoption of such child, the court shall receive evidence with regard to the actual paternity of the child and whether such father is a fit, proper, and suitable custodial parent for the child. The court shall determine that such father's consent is not required for a valid adoption of the child upon a finding of one or more of the following:
>
> (1) The father abandoned or neglected the child after having knowledge of the child's birth;
>
> (2) The father is not a fit, proper, and suitable custodial parent for the child;
>
> (3) The father had knowledge of the child's birth and failed to provide reasonable financial support for the mother or child;
>
> (4) The father abandoned the mother without reasonable cause and with knowledge of the pregnancy;
>
> (5) The father had knowledge of the pregnancy and failed to provide reasonable support for the mother during the pregnancy.

Because § 43-104.22 can effectively terminate the parental rights of the father, the exceptions under § 43-104.22 must be proved by clear and convincing evidence.[10]

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[8] *In re Adoption of Jaden M.*, 272 Neb. 789, 725 N.W.2d 410 (2006).

[9] *In re Adoption of Corbin J.*, 278 Neb. 1057, 775 N.W.2d 404 (2009).

[10] See *In re Interest of Hope L. et al.*, 278 Neb. 869, 775 N.W.2d 384 (2009).

ABANDONMENT/NEGLECT OF CHILD

[9-12] Dakota argues that Jeremiah has abandoned the child because he has failed to make a genuine effort to provide child assistance. Section 43-104.22(1) states that "[t]he father abandoned or neglected the child after having knowledge of the child's birth." Willful abandonment has been defined as a voluntary and intentional relinquishment of the custody of the child to another, with the intent to *never again* claim the rights of a parent or perform the duty of a parent; or, second, an intentional withholding from the child, without just cause or excuse, by the parent, of his presence, his care, his love and his protection, maintenance, and the opportunity for the display of filial affection.[11] The question of abandonment is largely one of intent to be determined in each case from all the facts and circumstances.[12] Evidence of a parent's conduct is relevant to a determination of whether the purpose and intent of that parent was to abandon the child.[13] The issue of abandonment in an adoption proceeding must be established by clear and convincing evidence.[14]

The evidence supports the county court's finding that this exception to consent was inapplicable. The record indicates that upon being told definitively that the child was his, Jeremiah repeatedly attempted to communicate with Dakota about the well-being of the child. After receiving notice of the birth, he immediately objected to the adoption, and he testified at trial that it was his intent to gain custody.

Although Jeremiah failed to provide assistance for the child, such evidence alone is insufficient to establish that he intended to never again claim his parental rights. The record establishes that Dakota's actions hindered Jeremiah's attempts to provide assistance by refusing to return his telephone calls and by making it obvious that she wanted Jeremiah to have nothing to do with the child. The record also establishes that Jeremiah

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[11] *In re Adoption of David C.*, 280 Neb. 719, 790 N.W.2d 205 (2010).

[12] *Id.*

[13] *Id.*

[14] *Id.*

has repeatedly expressed intent to be actively involved in the child's life.

Considering all of the evidence and giving weight to the county court's factual findings, we hold that the county court did not err in finding that Dakota failed to establish by clear and convincing evidence that Jeremiah neglected or abandoned the child. The finding is supported by competent evidence and is neither arbitrary, capricious, nor unreasonable.

Fit, Proper, and Suitable

Dakota argues that Jeremiah is not a fit, proper, and suitable custodial parent for the child, because he has an unstable work history, a history of drug abuse, a history of verbal and physical abuse, and a criminal record.

[13,14] Section 43-104.22(2) states that consent is not required if "[t]he father is not a fit, proper, and suitable custodial parent for the child." We have not defined "fit, proper, and suitable" in the context of § 43-104.22. However, we have defined parental unfitness in the context of termination of parental rights cases as a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which caused, or probably will result in, detriment to a child's well-being.[15] Unfitness must be proved by clear and convincing evidence.[16]

Dakota asserts that Jeremiah is unfit because he has smoked marijuana and snorted cocaine. She also claims that Jeremiah was physically and verbally abusive. Jeremiah denied both of these allegations under oath. Although the county court did not make a specific finding on this evidence, we give deference to its general finding that this did not clearly and convincingly establish that Jeremiah was unfit. In this instance, it appears credible evidence was in conflict. Therefore, we give weight to the fact that the county court generally accepted Jeremiah's version of the facts.

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[15] *In re Interest of Kendra M. et al.*, 283 Neb. 1014, 814 N.W.2d 747 (2012).

[16] See *id.*

Additionally, Dakota argues that Jeremiah has an unstable work history. But Jeremiah had a full-time job for 7 months prior to the summary judgment hearing and was earning $12.50 per hour. Although he did not earn a lot of money, Jeremiah had at one point saved over $2,000 in order to take care of the child. Although his job history may not be ideal, the evidence indicates that Jeremiah is now working a stable job. And in any event, low income or an unstable job history does not alone establish parental unfitness.

Finally, Dakota argues that Jeremiah is unfit because of his criminal history. However, his convictions are relatively minor and none of the crimes speak directly to his ability to be a fit parent for the child. The record indicates that the convictions occurred 3 years prior to the summary judgment hearing, when Jeremiah was age 18, and Jeremiah testified that he has matured since the convictions. Although convictions are to be taken seriously, the county court did not err in determining that they were insufficient to determine Jeremiah to be unfit.

After giving deference to the county court's credibility determinations concerning the accusations of drug use and physical and mental abuse, we find Dakota did not prove parental unfitness by clear and convincing evidence under § 43-104.22(2).

Failed to Provide Reasonable Financial Support

Next, Dakota argues that Jeremiah has failed to provide reasonable financial support. Section 43-104.22(3) states that consent for adoption is not required if "[t]he father had knowledge of the child's birth and failed to provide reasonable financial support for the mother or child."

It is uncontested that Jeremiah did not provide financial support for Dakota or the child. However, the county court's order directly addresses this issue. The county court stated that "[w]hile it is clear that [Jeremiah] has not provided support to the child either during pregnancy or since birth given the conduct of [Dakota] the court cannot find that [Jeremiah's] lack of response was unreasonable." In other words, Dakota made it very difficult for Jeremiah to provide financial support.

Dakota deliberately hid the birth of the child from Jeremiah. She did not answer or return his telephone calls. Jeremiah testified that he attempted to contact Dakota because he wanted to provide her with financial support. Jeremiah testified that he saved money for the child and acknowledged that he would pay back child support if the adoption did not go through.

We do not take issue with the county court's finding that Jeremiah's failure to provide reasonable financial support was excused because of the conduct of Dakota. We have previously stated that the adoption statutes do not allow a mother to singlehandedly sever a relationship between a father and child, no matter what the quality of that relationship is.[17] Dakota clearly does not want to have Jeremiah in the life of the child, and she chose to not provide Jeremiah with a fair opportunity to offer financial support. If the county court were to allow Dakota to actively deter Jeremiah from providing financial support and then terminate his rights on those grounds, the court would be allowing mothers to refuse assistance in an attempt to terminate the parental rights of unwed fathers. Therefore, we find no error in the county court's determination that Dakota's conduct excuses Jeremiah's failures.

Abandoned/Failed to Financially Support During Pregnancy

For her final argument, we have grouped subparagraphs (4) and (5) of § 43-104.22. Dakota argues that Jeremiah abandoned her and failed to provide financial support during her pregnancy. Section 43-104.22(4) states that "[t]he father abandoned the mother without reasonable cause and with knowledge of the pregnancy." Likewise, § 43-104.22(5) states that "[t]he father had knowledge of the pregnancy and failed to provide reasonable support for the mother during the pregnancy." Both exceptions require that the father had knowledge of the pregnancy.

Here, the evidence indicates that for the majority of the pregnancy, Dakota told Jeremiah that he was not the father.

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[17] *In re Application of S.R.S. and M.B.S.*, 225 Neb. 759, 408 N.W.2d 272 (1987).

Jeremiah did not receive formal notice that he was the purported father until November 2011. The evidence indicates that once he received notice, Jeremiah made attempts to contact Dakota to discuss the pregnancy, which are confirmed by telephone records. A caseworker with the adoption agency testified that Jeremiah had asked her questions about the pregnancy so that he could protect his parental rights.

The county court found that Dakota intentionally hid her pregnancy and the birth of the baby from Jeremiah in an attempt to procedurally bar him from objecting to the adoption. This finding is not appealed by Dakota.

Considering the entire record as presented, we find that competent evidence supports the county court's finding that Jeremiah was excused for not providing financial support during Dakota's pregnancy because of Dakota's actions to not include him in her pregnancy.

CONCLUSION

The county court's finding that Dakota did not prove by clear and convincing evidence that Jeremiah's consent was not required under § 43-104.22 is well supported by competent evidence. The decision of the county court is affirmed.

AFFIRMED.

CAROLYN CARLSON AND RICHARD CARLSON, APPELLANTS, V. ALLIANZ VERSICHERUNGS-AKTIENGESELLSCHAFT AND DOES 1 THROUGH 50, INCLUSIVE, APPELLEES.

844 N.W.2d 264

Filed March 7, 2014. No. S-13-492.

1. **Motions to Dismiss: Appeal and Error.** A district court's grant of a motion to dismiss is reviewed de novo.
2. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
3. **Declaratory Judgments: Courts: Jurisdiction: Parties: Waiver.** The presence of necessary parties in declaratory judgment actions is jurisdictional and cannot be waived, and if such persons are not made parties, then the district court has no jurisdiction to determine the controversy.

4. **Jurisdiction.** It is fundamental that a court has the power to determine whether it has jurisdiction over the matter before it.
5. **Actions: Parties.** A dismissal based upon a failure to join a necessary party is a dismissal of the action without prejudice.
6. **Courts: Jurisdiction.** In civil cases, a court of general jurisdiction has inherent power to vacate or modify its own judgment at any time during the term in which the court issued it.
7. **Courts: Motions to Vacate: Time.** Neb. Rev. Stat. § 25-2001(1) (Reissue 2008) provides for the exercise of the inherent power to vacate after the end of the term upon a motion filed within 6 months after the entry of the judgment.
8. **Actions: Motions to Vacate: Service of Process.** A proceeding to vacate a judgment on grounds contained in Neb. Rev. Stat. § 25-2001(4) (Reissue 2008) shall be by complaint, and on such complaint, a summons shall issue and be served as in the commencement of an action.
9. **Service of Process.** The methods of service prescribed by the Hague Convention are mandatory where service abroad to a person in a signatory country is required.
10. **Service of Process: Waiver.** Under Neb. Rev. Stat. § 25-516.01 (Reissue 2008), a voluntary appearance is the equivalent to service that waives a defense of insufficient service or process if the party requests general relief from the court on an issue other than sufficiency of service or process, or personal jurisdiction.
11. **Rules of the Supreme Court: Pleadings: Waiver.** Neb. Ct. R. Pldg. § 6-1112(b) explicitly provides that no defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion.
12. **Motions to Dismiss: Jurisdiction: Rules of the Supreme Court: Pleadings.** When a motion to dismiss raises a defense under Neb. Ct. R. Pldg. § 6-1112(b)(6) and any combination of § 6-1112(b)(2), (4), and (5), the court should consider dismissal under § 6-1112(b)(2), (4), and (5) first and should consider dismissal under § 6-1112(b)(6) only if it determines that it has jurisdiction and that process and service of process were sufficient.
13. **Equity.** Equitable remedies are generally not available where there exists an adequate remedy at law.
14. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.
15. ____. An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.

Appeal from the District Court for Lancaster County: ROBERT R. OTTE, Judge. Affirmed.

Thomas G. Sundvold, of Sundvold Law Firm, P.C., L.L.O., and Raymond D. McElfish, of McElfish Law Firm, P.C., L.L.O., for appellants.

Kyle Wallor and Sarah F. Macdissi, of Lamson, Dugan & Murray, L.L.P., for appellee Allianz Versicherungs-Aktiengesellschaft.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and CASSEL, JJ.

CASSEL, J.

I. INTRODUCTION

Twenty months after the district court dismissed the appellants' declaratory judgment action against an insurance company for failure to join a necessary party, the appellants filed a complaint to vacate the judgment. The district court sustained the insurance company's motion to dismiss the complaint. Because we conclude that (1) the time for exercise of the district court's inherent power to vacate its judgment had expired, (2) the court lacked jurisdiction to vacate its judgment under Neb. Rev. Stat. § 25-2001(4) (Reissue 2008) due to insufficient service of process on the insurance company, and (3) the court did not err in declining to exercise its equitable power to vacate where the appellants had an adequate remedy at law, we affirm.

II. BACKGROUND

1. UNDERLYING LAWSUIT AND BANKRUPTCY STAY

In February 2005, the appellants, Carolyn Carlson and Richard Carlson, were involved in a rollover collision while driving their Chrysler PT Cruiser. The back of Carolyn's seat collapsed during the rollover, and she suffered a cervical fracture and paralysis from the neck down. The Carlsons filed a products liability action against Daimler-Chrysler Corporation in the district court for Lancaster County, Nebraska.

In April 2009, prior to the scheduled trial date, Chrysler LLC sought chapter 11 bankruptcy protection. The bankruptcy court imposed an automatic stay, which stayed the Carlsons' suit.

In May 2009, the Carlsons sought the bankruptcy court's relief from the automatic stay. In their motion, they alleged that the state court proceeding was not connected to and would not interfere with the bankruptcy case and that litigation in the Nebraska state court would not prejudice the interests of

other creditors and interested parties. Old Carco LLC and its affiliated debtors and debtors in possession filed an objection. (Daimler-Chrysler Corporation and Old Carco LLC, formerly known as Chrysler LLC, will be referred to as "Chrysler" in this opinion.) They alleged, among other things, that they did not have "'first-dollar' insurance coverage with respect to costs incurred defending against [the Carlsons'] specific claim" and that Chrysler's estate would be depleted by the litigation of the lawsuit. The bankruptcy court denied the Carlsons' motion.

2. Suit Against Allianz

Allianz Versicherungs-Aktiengesellschaft (Allianz), a foreign insurance company, provided insurance to Chrysler. On February 22, 2010, the Carlsons filed a complaint for declaratory relief against Allianz. This suit was also filed in the district court for Lancaster County, Nebraska. The Carlsons alleged that Allianz was an excess insurer obligated to "drop down" and provide "first dollar coverage" to Chrysler because Chrysler, which was partially self-insured, had become insolvent. The Carlsons alleged that Allianz had an immediate duty to defend Chrysler in the underlying products liability action. They requested judicial determination of the duties and obligations of Allianz. The Carlsons filed a praecipe directing the clerk of the court to issue summons for service of process on Allianz in Munich, Germany. Because Allianz is a German entity, the district court entered an order authorizing a service company to effect service of process on Allianz in Germany. Allianz was thereafter served in Germany.

Allianz filed a motion to dismiss pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6) (failure to state claim) and (7) (failure to join necessary party). Allianz argued that Chrysler was a necessary party, but the Carlsons disagreed. The district court overruled the motion. The court reasoned that it could not, as a matter of law, exclude the possibility that the insurance policy contained terms and conditions whereby Chrysler would not be a necessary party to the underlying accident.

3. Bankruptcy Confirmation Order and Plan Injunction

On April 23, 2010, the bankruptcy court entered an order confirming a second amended joint plan of liquidation of debtors and debtors in possession, as modified. The confirmation order, which had an effective date of April 30, stated in part:

> 30. . . . In addition, as of the Effective Date, the injunction imposed by Section III.E.4 of the Plan (the "Plan Injunction") will be deemed modified solely to the extent necessary to (a) permit Tort Claimants to commence, pursue or continue litigation to pursue applicable insurance, including litigation against the Debtors' insurers, if any ("Insurance Litigation"); and (b) in connection therewith, to name one or more of the Debtors as nominal defendants, with the naming of such nominal defendants and such Insurance Litigation being solely for the purpose of pursuing claims against and collection of payment of proceeds under any such insurance, if any . . . .
>
> 31. Except as described in this paragraph and in paragraph 30 above, the modification of the Plan Injunction in the foregoing paragraph 30 shall not: (a) expand, limit or otherwise impact in any way any rights of any Tort Claimant, the applicable insurer, if any, the Debtors, the Liquidation Trust, the Liquidation Trustee or any other party with respect to any matter; (b) authorize, or be deemed or construed to authorize, any Tort Claimant, the applicable insurer or any other party to seek further relief against the Debtors or the Liquidation Trust or the Liquidation Trustee in any forum outside of the Bankruptcy Court with respect to the Tort Claim; (c) be deemed to modify the Plan Injunction to allow any party to pursue any action, or attempt to enforce any right, against the Debtors, the Liquidation Trust or the Liquidation Trustee (including, but not limited to, seeking (i) reimbursement of any amount, including any deductible amount, defense costs or expenses from the Debtors, the Liquidation Trust or the Liquidation Trustee, (ii) any

> discovery from the Debtors, the Liquidation Trust or the Liquidation Trustee with respect to the Debtors' records, personnel, assets and other information related thereto, (iii) to compel the appearance or testimony of any of the Liquidation Trust's employees, officers, managers, agents or other Representatives (in their capacities as such) in the Insurance Litigation or (iv) otherwise to compel the Liquidation Trust's employees, officers, managers, agents or other Representatives or counsel (in their capacities as such) to participate in the Insurance Litigation); or (d) limit the ability of the Debtors or the Liquidation Trust to seek to include Tort Claims asserted in the Chapter 11 Cases in any ADR Procedures in the Bankruptcy Court.

4. Allianz' Motion for Summary Judgment

In October 2010, Allianz moved for summary judgment in the suit initiated by the Carlsons against it. On March 8, 2011, the district court entered an order sustaining Allianz' motion. The court examined the insurance policy and reasoned that under its terms, Allianz' "obligation to indemnify Chrysler is only triggered after Chrysler has exhausted its $25 million self[-]insured retention and Chrysler's liability is fixed by entry of final judgment." The court found that the insurance policy and any policy proceeds were part of Chrysler's bankruptcy estate and were subject to the automatic stay. The district court stated, "Assuming *arguendo* the stay does not apply, [Allianz] argues that Chrysler's policy does not provide drop[-]down coverage to the [Carlsons]," and proceeded to engage in an analysis concerning drop-down coverage. The court found that under the terms of the policy, Allianz was an excess liability insurer and was not required to drop down and provide coverage to Chrysler as a partially self-insured entity. The court next addressed Allianz' argument that Chrysler was a necessary party as required by Neb. Rev. Stat. § 25-21,149 et seq. (Reissue 2008). The court determined that Chrysler was a necessary party, reasoning that Allianz would be prejudiced in being forced to litigate the issues without Chrysler.

The court further stated that the Carlsons' "fight clearly appears to be proper in the existing forum of the Bankruptcy Court." Ultimately, the court found that there were no genuine issues of material fact and sustained Allianz' motion for summary judgment.

Following the entry of the March 2011 summary judgment dismissing the suit against Allianz, the Carlsons did not file an appeal within 30 days, file a motion to alter or amend the judgment within 10 days, or file a motion to vacate prior to the end of the court's term.

5. Bankruptcy Order

On August 17, 2012, the bankruptcy court entered a "Stipulation and Agreed Order" which granted limited modification of the plan injunction with respect to the Carlsons. The order recognized that the Carlsons had filed suit against Allianz. The order stated that the April 2010 confirmation order had modified the plan injunction to allow a tort claimant to commence or continue litigation to pursue applicable insurance and, in connection therewith, to name one or more of the debtors as nominal defendants. The order then stated:

> Nevertheless, the [Carlsons] have informed the Liquidation Trust that, on account of the Plan Injunction, the Trial Court will not permit the Insurance Litigation to proceed against Allianz . . . absent an order from the Bankruptcy Court modifying the Plan Injunction, to the extent necessary, to permit the Insurance Litigation to proceed.

The bankruptcy debtors (which did not include Allianz) therefore stipulated that the Carlsons could amend the complaint against Allianz to name Chrysler as a nominal defendant, consistent with paragraph 31 of the confirmation order.

6. Complaint to Vacate

On November 15, 2012, the Carlsons filed a complaint to vacate the March 2011 summary judgment. They submitted the following "new facts" for the district court's consideration, which were based on the bankruptcy court's August 2012 order: (1) The plan injunction was amended to permit the continued prosecution of the declaratory judgment action against

Allianz and to permit the Carlsons to amend the complaint to name Chrysler as a nominal defendant; (2) the excess policy of Allianz is not the property of Chrysler, and the plan injunction was amended to permit this litigation to proceed against Allianz and its excess insurance policy to determine whether Allianz owes coverage for the loss involving the Carlsons; (3) the self-insured retention of Chrysler has been depleted through payment of claims in the bankruptcy proceeding; and (4) the amendment of the plan injunction allowing this action to proceed against Allianz lifted the automatic stay of the bankruptcy court so that this action can be litigated and decided on its merits.

The Carlsons sought to have the summary judgment vacated under § 25-2001 or under the court's independent equity jurisdiction to allow reinstatement of the case so that the Carlsons could amend the complaint to name Chrysler as a nominal defendant.

Allianz moved to dismiss the Carlsons' complaint to vacate. Allianz alleged that the complaint should be dismissed pursuant to § 6-1112(b)(5) because the Carlsons' service of process violated both Nebraska and international law. The Carlsons had served summons by certified mail on Allianz' attorney in Omaha, Nebraska. Counsel for Allianz submitted an affidavit stating that he is not the registered agent for Allianz and that he has not been authorized to accept, sign for, or receive service of process on Allianz' behalf. Allianz also alleged that dismissal was warranted under § 6-1112(b)(6) for failure to state a claim upon which relief may be granted.

7. District Court's Order

The district court entered a 22-page order sustaining Allianz' motion to dismiss. The court reasoned that the plain language of § 25-2001(1) provides for relief within the court's same term or 6 months after entry of the court's own judgment or order, but that the statute "does not provide for relief after a court allegedly 'gains' jurisdiction from an outside court order." The court stated that the August 2012 order provided for relief that the Carlsons possessed at the time of Allianz' summary judgment motion, i.e., naming Chrysler as a nominal

defendant for purposes of pursuing insurance claims. The court concluded that it did not gain anything with the bankruptcy court's August 2012 order, because nothing had changed with regard to the excess policy and the self-insured retention of $25 million, and that thus, the Carlsons could not acquire relief under the inherent powers of the court.

The court determined that the motion to vacate was procedurally defective under § 25-2001(4), because the Carlsons did not issue and serve summons on Allianz. Assuming for the sake of argument that the Carlsons properly served the complaint to vacate on Allianz, the court engaged in a lengthy analysis regarding "newly discovered" evidence and concluded that the Carlsons had not presented any such evidence.

Finally, the court determined that the Carlsons could not avail themselves of the court's independent equity jurisdiction to vacate the summary judgment. The court observed that the Carlsons had not appealed the entry of summary judgment, filed a motion to alter or amend the judgment, filed a motion to vacate the judgment prior to the end of the court's term, or requested to amend their complaint to name Chrysler as a nominal defendant and that their arguments in support of vacating the summary judgment were the same ones made at the time the summary judgment motion was argued and submitted.

The Carlsons timely appealed, and we moved the case to our docket under our statutory authority to regulate the caseloads of the appellate courts of this state.[1]

III. ASSIGNMENTS OF ERROR

The Carlsons allege, consolidated and restated, that the district court erred by (1) dismissing their complaint to vacate and (2) issuing an advisory opinion regarding drop-down coverage.

IV. STANDARD OF REVIEW

[1] An appellate court will reverse a decision on a motion to vacate only if the litigant shows that the district court abused its discretion.[2] But this case comes to us on an appeal from

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[1] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

[2] *Johnson v. Johnson*, 282 Neb. 42, 803 N.W.2d 420 (2011).

the district court's sustaining of Allianz' motion to dismiss the complaint to vacate. A district court's grant of a motion to dismiss is reviewed de novo.[3] Because the matter was disposed based upon Allianz' motion to dismiss, we review the issue de novo.

[2] Because the Carlsons do not assign error to the district court's determination that Allianz' motion was not converted to a motion for summary judgment, we do not address that question. In disposing of Allianz' motion to dismiss, the court held a hearing and received evidence. Section 6-1112(b) provides that when matters outside the pleading are presented by the parties and accepted by the trial court with respect to a motion to dismiss under § 6-1112(b)(6), the motion "shall be treated" as a motion for summary judgment as provided in Neb. Rev. Stat. §§ 25-1330 to 25-1336 (Reissue 2008) and the parties shall be given reasonable opportunity to present all material made pertinent to such a motion by statute.[4] We have noted that a court may take judicial notice of matters of public record without converting a § 6-1112(b)(6) motion to dismiss into a motion for summary judgment.[5] The evidence received by the court concerning the § 6-1112(b)(6) motion to dismiss included pleadings and briefs in the instant case, pleadings in the underlying lawsuit, motions and orders in the bankruptcy court, and the Allianz insurance policy. The district court considered the question and concluded that receipt of these materials did not result in a conversion of the motion. To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.[6] The Carlsons did not assign or argue that the district court erred in this regard. Thus, we do not consider whether the motion to dismiss was transformed into a motion for summary judgment.

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[3] *Estate of Teague v. Crossroads Co-op Assn.*, 286 Neb. 1, 834 N.W.2d 236 (2013).

[4] *DMK Biodiesel v. McCoy*, 285 Neb. 974, 830 N.W.2d 490 (2013).

[5] See *id.*

[6] *Wulf v. Kunnath*, 285 Neb. 472, 827 N.W.2d 248 (2013).

V. ANALYSIS

Before addressing the Carlsons' assignments of error, we pause to clarify the effect of the March 2011 judgment and ensuing developments.

The critical matter decided by the March 2011 judgment was Chrysler's status as a necessary party to the Carlsons' suit against Allianz. The court recounted that a stay had been imposed by the bankruptcy court, thus barring the commencement or prosecution of an action against Chrysler without an order from the bankruptcy court lifting or modifying the automatic stay. The court observed that the parties disagreed regarding whether Chrysler was a necessary party, with the Carlsons taking the position that Chrysler was not a necessary party. According to the order, the Carlsons argued that Chrysler's interests were wholly protected in its absence by Allianz' presence and that there was no controversy between Allianz and Chrysler in this action because the present lawsuit would not adjudicate any rights between Chrysler and the injured parties. The court determined that Chrysler was a necessary party.

[3-5] The determination that Chrysler was a necessary party was jurisdictional and became a final order dismissing the Carlsons' action without prejudice. The presence of necessary parties in declaratory judgment actions is jurisdictional and cannot be waived, and if such persons are not made parties, then the district court has no jurisdiction to determine the controversy.[7] It is fundamental that a court has the power to determine whether it has jurisdiction over the matter before it.[8] When the district court determined that Chrysler was a necessary party and implicitly determined that the Carlsons were not going to ask to bring Chrysler in as a party (or could not do so because of the bankruptcy stay), dismissal—achieved in this case by sustaining Allianz' motion for summary judgment—was appropriate. This was a final order[9] from which

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[7] *Dunn v. Daub*, 259 Neb. 559, 611 N.W.2d 97 (2000).

[8] See *Ryan v. Ryan*, 257 Neb. 682, 600 N.W.2d 739 (1999).

[9] See Neb. Rev. Stat. § 25-1902 (Reissue 2008).

no appeal was taken. And it is clear that a dismissal based upon a failure to join a necessary party is a dismissal of the action without prejudice.[10] Thus, the March 2011 order dismissing the Carlsons' suit against Allianz was a dismissal without prejudice.

Subsequently, the Carlsons obtained explicit permission from the bankruptcy court to bring Chrysler in as a nominal party in this declaratory judgment action against Allianz. But this did not change the situation in effect at the time of the March 2011 judgment.

With this background, we turn to the errors assigned by the Carlsons.

1. Dismissal of Complaint to Vacate

(a) Inherent Power to Vacate

[6] In civil cases, a court of general jurisdiction has inherent power to vacate or modify its own judgment at any time during the term in which the court issued it.[11] The applicable district court rule provides that the term of the court is the calendar year.[12] Here, the Carlsons' November 2012 complaint sought to vacate the March 2011 judgment. Because the Carlsons did not file their complaint to vacate within the 2011 calendar year, the court lacked the inherent power to vacate the judgment.

[7] The district court's inherent power to vacate the judgment, as extended by statute, had also expired. Section 25-2001(1) provides for the exercise of the inherent power to vacate after the end of the term upon a motion filed within 6 months after the entry of the judgment. Because the judgment was entered in March 2011 and the Carlsons did not file their complaint to vacate until November 2012, the court's inherent power to vacate as extended by § 25-2001(1) had expired.

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[10] See *Taylor Oil Co. v. Retikis*, 254 Neb. 275, 575 N.W.2d 870 (1998).

[11] *Fitzgerald v. Fitzgerald*, 286 Neb. 96, 835 N.W.2d 44 (2013).

[12] See Rules of Dist. Ct. of Third Jud. Dist. 3-1 (rev. 1999).

(b) Vacation of Judgment Under § 25-2001(4)

[8] The Carlsons argue that the district court erred in finding that their complaint to vacate was procedurally defective under § 25-2001(4). A proceeding to vacate a judgment on grounds contained in § 25-2001(4) "shall be by complaint," and "[o]n such complaint a summons shall issue and be served as in the commencement of an action."[13] We focus on the requirement for service of process, as it is dispositive of the Carlsons' argument relying upon § 25-2001(4).

[9] At oral argument, counsel for the Carlsons conceded that the complaint to vacate was not properly served under the Hague Convention.[14] The methods of service prescribed by the Hague Convention are mandatory where service abroad to a person in a signatory country is required.[15] Allianz concededly falls within the protection of the Hague Convention. Rather than implementing the procedures prescribed by the Hague Convention, the Carlsons filed a praecipe with their complaint to vacate which directed the clerk of the court to issue summons and deliver it to Allianz' attorney via certified mail at the attorney's Omaha office. By conceding their failure to utilize the Hague Convention's procedures, they acknowledged that their attempt to serve Allianz' Nebraska counsel was not sufficient to comply with § 25-2002. But this does not end our analysis under § 25-2001(4), because the Carlsons argue that Allianz waived the necessity of service of process on the motion to vacate.

In the Carlsons' argument on waiver, they assert that Allianz did so by voluntarily appearing on other issues before the court, and they rely upon our decision in *Doe v. Board of Regents*.[16] Allianz agrees that *Doe* controls, but disputes the Carlsons'

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[13] Neb. Rev. Stat. § 25-2002 (Reissue 2008).

[14] See Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361.

[15] See *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 108 S. Ct. 2104, 100 L. Ed. 2d 722 (1988).

[16] *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010).

interpretation of our *Doe* opinion. We therefore summarize our decision in that case.

[10] In *Doe*, John Doe sued the Board of Regents of the University of Nebraska, the University of Nebraska Medical Center (UNMC), and eight UNMC faculty members in each individual's official and individual capacities. Doe served summons at the Attorney General's office. The defendants moved to dismiss under the following subsections of § 6-1112: subsection (b)(1) (lack of jurisdiction), subsection (5) (insufficiency of service), and subsection (6) (failure to state claim). At the hearing on the motion to dismiss, the defendants stated that they were not challenging service on them in their official capacities but that the UNMC faculty members had not been properly served in their individual capacities. Doe argued that the defendants all made voluntary appearances at the hearing on their motion to dismiss. Under Neb. Rev. Stat. § 25-516.01 (Reissue 2008), a voluntary appearance is the equivalent to service that waives a defense of insufficient service or process if the party requests general relief from the court on an issue other than sufficiency of service or process, or personal jurisdiction.[17] We observed that the defendants affirmatively pled insufficiency of service of process under § 6-1112(b)(5) and voluntarily appeared in their individual capacities only to object to the sufficiency of process and that "[w]hile they also moved to dismiss Doe's complaint under other subsections of [§ 6-11]12(b), the defendants, in their official capacities, did not waive a defense or objection by joining one or more other [§ 6-11]12(b) defenses or objections in a responsive motion."[18] We summarized as follows: "[S]tate officials, in their individual capacities, can challenge service while still reserving the right, in their official capacities, to contest a plaintiff's claims on other grounds."[19] Although Allianz was not being sued in more than one capacity, we agree with Allianz' reading of *Doe*.

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[17] *Id.*

[18] *Id.* at 509, 788 N.W.2d at 280.

[19] *Id.*

[11,12] Allianz did not waive its defense of insufficient service of process under § 6-1112(b)(5) by asserting a defense of failure to state a claim under § 6-1112(b)(6) in the same motion. Section 6-1112(b) explicitly provides that "[n]o defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion." And we have stated that when a motion to dismiss raises a defense under § 6-1112(b)(6) and any combination of § 6-1112(b)(2), (4), and (5), the court should consider dismissal under § 6-1112(b)(2), (4), and (5) first and should consider dismissal under § 6-1112(b)(6) only if it determines that it has jurisdiction and that process and service of process were sufficient.[20] Here, Allianz affirmatively pled insufficiency of service of process under § 6-1112(b)(5) and asked the court during the hearing to "take judicial notice of the court file, specifically with respect to the information in the court file about the service of process of the complaint to vacate [the court's] prior order." We conclude that Allianz did not waive this defense by also offering exhibits and argument in support of its defense that the complaint to vacate on grounds other than under § 25-2001(4) failed to state a claim upon which relief could be granted. Because the Carlsons did not properly serve Allianz under § 25-2002, we do not consider their argument concerning newly discovered evidence under § 25-2001(4).

(c) Equitable Power to Vacate

[13] The Carlsons claim that the district court could have properly invoked its equity jurisdiction and vacated the March 2011 judgment. But equitable remedies are generally not available where there exists an adequate remedy at law.[21] Following the court's judgment in March 2011, the Carlsons did not (1) appeal the order; (2) move to alter or amend the judgment; (3) move to vacate the judgment on or before December 31, 2011; or (4) request to amend their complaint in order to name Chrysler as a nominal defendant. Further, after obtaining the

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[20] See *Doe v. Board of Regents*, *supra* note 16.

[21] *Jeffrey B. v. Amy L.*, 283 Neb. 940, 814 N.W.2d 737 (2012).

bankruptcy court's relief from the automatic stay, the Carlsons could have filed a new declaratory judgment action which named Chrysler as a nominal defendant rather than seeking to vacate the March 2011 judgment. Because the Carlsons had an adequate remedy at law, they were not entitled to equitable relief from the judgment.

2. Advisory Opinion

[14,15] The Carlsons also argue that the district court improperly issued an advisory opinion and that the court's conclusion that there is no possibility of drop-down coverage until Chrysler's liability is fixed by entry of a final judgment was erroneous. However, a determination of whether the court improperly issued an advisory opinion is not necessary to our adjudication. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[22] Further, this issue was not raised to the district court. An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.[23] Accordingly, we decline to address this assigned error.

VI. CONCLUSION

We conclude that the time for exercise of the district court's inherent power to vacate its judgment—both within term and as extended by § 25-2001(1)—had expired. Because the Carlsons did not properly serve Allianz as required by § 25-2002, the court lacked jurisdiction to vacate its judgment under § 25-2001(4). Because the Carlsons had an adequate remedy at law, we find no error in the district court's sustaining of Allianz' motion to dismiss the Carlsons' attempt to invoke the district court's equitable power to vacate. Accordingly, we affirm.

Affirmed.

Miller-Lerman, J., participating on briefs.

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[22] *Lang v. Howard County*, *ante* p. 66, 840 N.W.2d 876 (2013).

[23] *First Express Servs. Group v. Easter*, 286 Neb. 912, 840 N.W.2d 465 (2013).

IN RE INTEREST OF SAMANTHA C., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. SAMANTHA C., APPELLANT.

843 N.W.2d 665

Filed March 7, 2014. No. S-13-533.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. **Statutes.** The meaning of a statute is a question of law.
3. **Juvenile Courts: Parental Rights.** The foremost purpose and objective of the Nebraska Juvenile Code is the protection of a juvenile's best interests, with preservation of the juvenile's familial relationship with his or her parents where the continuation of such parental relationship is proper under the law. The goal of juvenile proceedings is not to punish parents, but to protect children and promote their best interests.
4. **Juvenile Courts: Minors.** The Nebraska Juvenile Code must be construed to assure the rights of all juveniles to care and protection.
5. **Legislature: Intent.** The intent of the Legislature is expressed by omission as well as by inclusion.

Appeal from the County Court for Dodge County: KENNETH VAMPOLA, Judge. Affirmed.

Shane J. Placek, of Sidner Law, for appellant.

Sara VanBrandwijk, Deputy Dodge County Attorney, for appellee.

WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

CASSEL, J.

INTRODUCTION

Samantha C. appeals from a juvenile court order adjudicating her as being "habitually truant from . . . school."[1] She primarily argues that the State was required to first prove her school's compliance with the remedial measures set forth in a compulsory education statute.[2] Because (1) the Nebraska

[1] Neb. Rev. Stat. § 43-247(3)(b) (Reissue 2008).

[2] See Neb. Rev. Stat. § 79-209 (Cum. Supp. 2012).

Juvenile Code and the compulsory education statutes are separate statutory enactments with distinct purposes and goals and (2) the State met its burden of proving that Samantha was habitually truant from school, we affirm the court's order.

BACKGROUND

By filing a petition with the county court for Dodge County, Nebraska, sitting as a juvenile court, the State invoked the court's "exclusive original jurisdiction"[3] of Samantha. The State's petition alleged that Samantha was a juvenile as defined by § 43-247(3)(b) for being habitually truant from school. The petition, filed on March 11, 2013, specifically alleged that as of February 28 of the 2012-13 school year, Samantha had missed 48.14 days of school.

At the juvenile court's hearing on the State's petition, the guidance director for Samantha's school explained the circumstances of a referral she made to the county attorney regarding Samantha's school attendance. She testified that she made the referral on February 28, 2013. As of that date, Samantha had accumulated 48.14 days of absences from school. According to the guidance director, absences were classified as excused if the school received a doctor's note. If no doctor's note was provided, the absence was unexcused. She testified that 27 days of Samantha's absences were unexcused for that reason.

The guidance director revealed that she first became concerned regarding Samantha's attendance in September 2012. She testified that the school sent Samantha's parents several letters informing them of her current number of absences and warning them that the school was required to address excessive absences and make a report to the proper authorities. The letters advised Samantha and her parents that state law provides that "students cannot miss more than 5 days per quarter or 20 days in a school year for any reason." They further explained that absences caused by serious illness qualified as "excused" absences and requested that Samantha's parents provide the school with doctors' notes for her absences.

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[3] § 43-247.

The record shows that five of these letters were sent to Samantha's parents. The first was sent on September 19, 2012, when Samantha had missed 9 days of school. Others followed on November 13, when she had missed 16.429 days; on January 7, 2013, when she had missed 27.571 days; on January 11, when she had missed 31.5 days; and on February 12, when she had missed 43.142 days.

The record also shows that the county attorney's office sent a letter to Samantha's parents on January 18, 2013, warning them that it would consider filing a petition in juvenile court and charges against them if there was not a significant improvement in Samantha's attendance.

The guidance director explained that the school had requested Samantha's medical records in order to determine that her absences were not excused by serious illness. The school received records covering Samantha's medical visits from March 22, 2012, to January 23, 2013. The medical records detail instances of sickness characterized by cough, sore throat, vomiting, or fever, and chronic abdominal pain. However, according to the guidance director, two statements in the medical records showed that Samantha's absences were not excused by serious illness. The February 12, 2013, medical summary contained the statement, "Get her back to school as soon as possible." The February 25 summary stated, "School tomorrow."

Samantha's attorney questioned the guidance director regarding the school's definition of truancy. The director testified that the school defined truancy as "skipping school or not being in school for a reason." She also explained that if a parent or guardian grants a child permission to miss school, the school does not consider the child to be truant. She further admitted that it appeared Samantha's parents had consented to her absences from school.

The guidance director also acknowledged that to her knowledge, no meeting between the school attendance officer, school social worker, or the school principal and Samantha's parents had ever taken place to discuss an attendance plan. She further stated that she was unaware if any of the other measures the school had in place for chronically ill children, such as

providing a home tutor or arranging for parents to pick up homework, had been offered to Samantha. She also admitted that she did not know if an educational evaluation had been performed for Samantha during 2012 and that she was unaware if Samantha had ever seen the school psychologist.

Based upon the guidance director's testimony, Samantha argued that the juvenile court could not adjudicate her under § 43-247(3)(b), because the school had failed to provide her with the services outlined in § 79-209 to address excessive absenteeism. Section 79-209(2) requires school districts to develop a written policy on excessive absenteeism stating "the number of absences or the hourly equivalent upon the occurrence of which the school shall render all services in its power to compel such child to attend some public, private, denominational, or parochial school." Section 79-209(2) further provides that such services shall include one or more meetings between school officials and the child's parent or guardian to report and solve excessive absenteeism, educational counseling to address possible curriculum changes, educational evaluation to diagnose and treat any conditions contributing to excessive absenteeism, and investigation by the school social worker. Thus, because the State did not present any evidence that the school had provided her with these services before making the attendance referral, Samantha argued that the State did not meet its burden of proof and could not adjudicate her under § 43-247(3)(b).

The juvenile court entered an order finding that Samantha was a juvenile as defined by § 43-247(3)(b) for being habitually truant from school. The court found that as of February 28, 2013, Samantha had been truant with 27 unexcused absences from school. The court also rejected Samantha's argument that in order to adjudicate her under § 43-247(3)(b), the State was first required to prove her school's compliance with the compulsory education statutes. The court opined that the compulsory education statutes and the juvenile code are neither mutually inclusive nor mutually exclusive. Relying upon § 79-209(4), which states that "[n]othing in this section shall preclude a county attorney from being involved at any stage in the process to address excessive absenteeism," the court

found that the school's failure to comply with the compulsory education statutes did not preclude the county attorney from proceeding in juvenile court.

Samantha timely appealed the juvenile court's order. We moved the case to our docket pursuant to statutory authority.[4]

ASSIGNMENTS OF ERROR

Samantha assigns that the juvenile court erred in (1) determining that the State proved the allegations of the petition "by a preponderance of the evidence" and (2) concluding that Samantha's school and the State were not required to "attempt remedial measures specifically outlined under [§] 79-209 prior to pursuing court intervention."

STANDARD OF REVIEW

[1] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.[5]

[2] The meaning of a statute is a question of law.[6]

ANALYSIS

At oral argument, Samantha's counsel conceded that the correct burden of proof was proof beyond a reasonable doubt. The State's counsel agreed, and so do we. This is clear both in statute[7] and in case law.[8] And the juvenile court made the requisite finding using the correct standard. With that understanding, we turn to Samantha's specific arguments.

Adjudication Under § 43-247

Samantha argues that she was not truant under her school's definition of truancy. We do not have the school's written policy in our record. Samantha relies on the guidance director's

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[4] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

[5] *In re Interest of Candice H.*, 284 Neb. 935, 824 N.W.2d 34 (2012).

[6] *Holdsworth v. Greenwood Farmers Co-op*, 286 Neb. 49, 835 N.W.2d 30 (2013).

[7] See Neb. Rev. Stat. § 43-279(2) (Reissue 2008).

[8] See, e.g., *In re Interest of Joseph S.*, 13 Neb. App. 636, 698 N.W.2d 212 (2005).

testimony that if a parent or guardian granted a child permission to miss school, the school did not consider the child to be truant. Samantha also asserts that the school's policy regarding unexcused absences was unclear. While we agree that Samantha's parents apparently consented to her absences, we reject her assertion that the school's policy determined whether she was "habitually truant" under § 43-247(3)(b).

Section 79-209(3) permits a school attendance officer to make a report to the county attorney if a child is absent more than 20 days per year or the hourly equivalent, even if all of the absences are excused due to illness or otherwise. It mandates such a report if the child exceeds the 20-day absence limitation and "*any* of such absences are not excused."[9] The evidence presented at the adjudication hearing was uncontroverted that Samantha's school had determined that she had accumulated 48.14 days of absences during the school year, of which 27 days were unexcused absences. Thus, Samantha's unexcused absences exceeded the 20-day threshold for all absences.

We have held that the mere fact that a juvenile is not complying with the compulsory education statutes without being first excused by school authorities establishes truancy and grants the juvenile court jurisdiction under § 43-247(3)(b).[10] Clearly, 27 days of Samantha's absences were not excused by school authorities. She had not yet reached the age of 16, the age at which a parent may elect to withdraw his or her child from school.[11] There was no evidence that she was attending any other public, private, denominational, or parochial day school or a school electing not to meet accreditation or approval requirements. The State demonstrated her noncompliance with the compulsory education statutes and thereby established beyond a reasonable doubt her status as being habitually truant under § 43-247(3)(b).

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[9] § 79-209(3) (emphasis supplied).

[10] See *In re Interest of K.S.*, 216 Neb. 926, 346 N.W.2d 417 (1984) (superseded by statute as stated in *In re Interest of Kevin K.*, 274 Neb. 678, 742 N.W.2d 767 (2007)).

[11] See Neb. Rev. Stat. § 79-202 (Cum. Supp. 2012).

The record disproves Samantha's argument that the use of the compulsory education statutes to establish her status as being habitually truant within the meaning of § 43-247(3)(b) violated due process. She argues that she and her parents were unaware of the effect of unexcused absences within the context of § 79-209(3). But this argument clearly fails in light of the letters sent by the school to Samantha and her parents on multiple occasions. The letters notified them of Samantha's absences. The letters warned that the school was required to make an attendance referral to the county attorney when a child was absent more than 20 days of school per year and 1 or more of those absences was unexcused. The letters also explained that the school determined whether an absence was excused or unexcused based upon whether it was caused by serious illness and requested doctors' notes for Samantha's absences. Moreover, the county attorney's letter warned them that Samantha's excessive absences could result in a petition being filed in juvenile court. Thus, Samantha and her parents were given ample notice that the accumulation of more than 20 days of absences with 1 day being unexcused could result in the filing of a petition in juvenile court to adjudicate her under § 43-247(3)(b). We therefore find no due process concern in the juvenile court's determination that, with 27 unexcused absences, Samantha was habitually truant from school under § 43-247(3)(b). Upon our de novo review, we likewise find beyond a reasonable doubt that Samantha was habitually truant from school under § 43-247(3)(b).

Compliance With § 79-209

Perhaps anticipating our conclusion on her first assignment of error, Samantha next argues that the State could not meet its burden of proof, because it did not first present evidence that her school provided her with the services outlined in § 79-209 to address excessive absenteeism. She claims that the legislative intent of the compulsory education statutes and § 79-209 was to require remedial measures in order to avoid potential court involvement. Thus, she argues that a school's failure to attempt such remedial measures prohibits an adjudication for truancy under the juvenile code. We disagree.

[3] The Nebraska Juvenile Code and the compulsory education statutes are separate statutory enactments with distinct purposes and goals. The foremost purpose and objective of the juvenile code is the protection of a juvenile's best interests, with preservation of the juvenile's familial relationship with his or her parents where the continuation of such parental relationship is proper under the law.[12] The goal of juvenile proceedings is not to punish parents, but to protect children and promote their best interests.[13] Compulsory education statutes, however, impose reasonable regulations for the control and duration of basic education in fulfillment of a state's responsibility for the education of its citizens.[14] Further, our compulsory education statutes impose criminal sanctions upon those found to be in violation of the compulsory education requirements.[15]

We have previously explored the interplay between the Nebraska Juvenile Code and the compulsory education statutes. In *State v. Rice*,[16] we rejected the assertion that the compulsory education statutes must be construed in pari materia with the juvenile court act. We reasoned that chapter 79 of the Nebraska Revised Statutes, relating to compulsory school attendance, and what was then § 43-247, regarding the neglect of children, generally do not pertain to the same subject matter. This reasoning still applies. The purposes of the juvenile code are distinct and separate from those of the compulsory education statutes. The juvenile code permits rehabilitation and protection of children. Compulsory education statutes impose basic requirements for participation in education. We therefore reaffirm that the two statutory enactments are not pari materia and need not be construed conjunctively.

[4] Because the compulsory education statutes and § 43-247 need not be construed together, we conclude that § 79-209

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[12] *In re Interest of Corey P. et al.*, 269 Neb. 925, 697 N.W.2d 647 (2005).

[13] *Id.*

[14] See *State ex rel. Douglas v. Faith Baptist Church*, 207 Neb. 802, 301 N.W.2d 571 (1981).

[15] See Neb. Rev. Stat. § 79-210 (Reissue 2008).

[16] *State v. Rice*, 204 Neb. 732, 285 N.W.2d 223 (1979).

has no effect upon the juvenile court's exclusive and original jurisdiction over juveniles found to be within the meaning of § 43-247(3)(b). As we have already expressed, the foremost purpose and objective of the Nebraska Juvenile Code is to promote and protect the juvenile's best interests. Thus, the juvenile code must be construed to assure the rights of all juveniles to care and protection.[17] We therefore reject Samantha's assertion that the authority of the juvenile court to promote and protect a juvenile's best interests under § 43-247(3)(b) is premised upon a school's compliance with § 79-209. To accept her assertion would render the juvenile court's jurisdiction dependent upon an actor completely outside the control of the juvenile court, the juvenile, and his or her parents or guardians.

[5] Our conclusion also has support within § 79-209. Section 79-209 imposes no preconditions upon the juvenile court's jurisdiction with respect to those services it requires a school to provide to address excessive absenteeism. The intent of the Legislature is expressed by omission as well as by inclusion.[18] Had the Legislature desired to impose preconditions upon the juvenile court's jurisdiction under § 43-247(3)(b) based upon whether certain services were provided by the juvenile's school, it certainly could have done so. Further, § 79-209(4) provides that nothing within that section shall preclude the county attorney from being involved at any stage of the process to address excessive absenteeism. The Legislature's omission of any preconditions to juvenile court proceedings and its explicit disclaimer of any limitation upon a county attorney's involvement defeat Samantha's argument. A county attorney is empowered to file a petition in the juvenile court under § 43-247(3)(b), regardless of whether the services outlined in § 79-209 have been provided. We therefore hold that § 79-209 does not impose any preconditions upon the juvenile court's exclusive and original jurisdiction under § 43-247(3)(b).

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[17] See *In re Interest of Veronica H.*, 272 Neb. 370, 721 N.W.2d 651 (2006).

[18] *In re Adoption of Kailynn D.*, 273 Neb. 849, 733 N.W.2d 856 (2007).

CONCLUSION

The State presented sufficient evidence to establish beyond a reasonable doubt Samantha's status as being habitually truant under § 43-247(3)(b). We reject her argument that the State was first required to show that her school provided the services contemplated by § 79-209(2), and we hold that § 79-209 does not impose any preconditions upon the juvenile court's exclusive and original jurisdiction under § 43-247(3)(b). The judgment of the juvenile court is affirmed.

AFFIRMED.

HEAVICAN, C.J., participating on briefs.

KERFORD LIMESTONE CO., APPELLEE AND CROSS-APPELLANT, V. NEBRASKA DEPARTMENT OF REVENUE, A NEBRASKA ADMINISTRATIVE AGENCY, AND DOUGLAS EWALD, IN HIS CAPACITY AS THE STATE TAX COMMISSIONER FOR THE STATE OF NEBRASKA, APPELLANTS AND CROSS-APPELLEES.

844 N.W.2d 276

Filed March 14, 2014. No. S-13-035.

1. **Administrative Law: Final Orders: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. **Administrative Law: Judgments: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Administrative Law: Statutes: Appeal and Error.** To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. **Statutes: Appeal and Error.** An appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
5. ____: ____. An appellate court will not read into a statute a meaning that is not there.

6. **Statutes: Legislature: Intent.** The intent of the Legislature may be found through its omission of words from a statute as well as its inclusion of words in a statute.
7. **Statutes: Legislature: Presumptions.** The Legislature is presumed to know the general condition surrounding the subject matter of a legislative enactment, and it is presumed to know and contemplate the legal effect that accompanies the language it employs to make effective the legislation.
8. **Administrative Law: Appeal and Error.** In a review de novo on the record, the district court is required to make independent factual determinations based upon the record, and the court reaches its own independent conclusions with respect to the matters at issue.
9. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the District Court for Lancaster County: STEPHANIE F. STACY, Judge. Affirmed in part, and in part reversed and remanded with direction.

Jon Bruning, Attorney General, and L. Jay Bartel for appellants.

Shannon L. Doering and Luke F. Vavricek for appellee.

HEAVICAN, C.J., CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

PER CURIAM.

INTRODUCTION

The Nebraska Department of Revenue (Department) and Douglas Ewald, in his capacity as the State Tax Commissioner (collectively the State), appeal, and Kerford Limestone Co. (Kerford) cross-appeals from the district court's order in these tax protest proceedings. Kerford purchased a motor grader for use in its manufacturing business and claimed an exemption from sales and use tax on the purchase under Neb. Rev. Stat. § 77-2704.22 (Reissue 2009). The commissioner found that Kerford had failed to prove that the motor grader was exempt manufacturing machinery and equipment, as defined in Neb. Rev. Stat. § 77-2701.47 (Supp. 2005).

On appeal, the district court reversed the commissioner's determination that to qualify for an exemption, Kerford needed to establish that more than 50 percent of the motor grader's total use was in manufacturing. The court affirmed the

commissioner's determination that Kerford's use of the motor grader to maintain "haul roads" was not a use that qualified the motor grader as exempt under § 77-2701.47. The court remanded the proceedings for a determination whether use of the motor grader to maintain inventory stockpile areas qualified it for an exemption. We affirm in part, and in part reverse and remand with direction.

FACTS

In January 2006, Kerford purchased a CAT 160H motor grader for use in its limestone mining and manufacturing business. Claiming that the motor grader was exempt from taxation as manufacturing machinery and equipment under §§ 77-2701.47 and 77-2704.22, Kerford did not pay sales or use tax on the purchase. Per stipulation of the parties, Kerford uses the motor grader in its business "to maintain haul roads in and outside of the mine" and to maintain "inventory stockpile areas."

In December 2006, Kerford received a notice of deficiency determination from the Department, reflecting that Kerford owed $24,614 in sales and use taxes, interest, and penalties for various purchases between June 1, 2003, and May 31, 2006, including the motor grader. The parties reached an agreement on all deficiencies except that of use tax on the motor grader, which totaled $14,190, not including interest or penalties. Kerford filed a written protest as to that amount.

Prior to Kerford's protest, the commissioner had issued a revenue ruling interpreting the definition of manufacturing machinery and equipment in § 77-2701.47 for purposes of an exemption under § 77-2704.22. See Nebraska Department of Revenue Ruling 1-05-1 (Oct. 12, 2005). This revenue ruling provided in part: "If machinery and equipment has uses in addition to its manufacturing use, **the manufacturing use must be greater than 50% of total use** to qualify for the exemption." *Id.* (emphasis in original). After the Department sent the notice of deficiency determination but while Kerford's protest was pending, the Department's regulations were amended to include the content of Revenue Ruling 1-05-1. See 316 Neb. Admin. Code, ch. 1, § 107.07 (2011).

At a hearing on Kerford's protest, Kerford challenged the Department's interpretation that § 77-2701.47 restricted application of the manufacturing machinery and equipment exemption to machinery and equipment used for manufacturing more than 50 percent of the time. Kerford argued that the Department's interpretation was contrary to the Legislature's intent to provide a broad exemption, as shown by the plain language of the statute. Kerford also argued that both of the motor grader's uses—to maintain haul roads and to maintain inventory stockpile areas—were related to "'transporting, conveying, . . . or storing' raw materials in manufacturing" (ellipsis in original) and thus qualified the motor grader as manufacturing machinery and equipment under § 77-2701.47(1)(b). According to Kerford, using the motor grader to maintain inventory stockpile areas also qualified as a use in manufacturing under § 77-2701.47(1)(d).

After the hearing, the commissioner upheld the imposition of use tax on the motor grader. The commissioner defended the Department's interpretation of § 77-2701.47 as "a reasonable construction in light of case law on other exemptions to taxation." He determined that under the Department's interpretation, Kerford was not entitled to an exemption for the motor grader's use to maintain inventory stockpile areas, because Kerford had not met its burden of proving "how much the motor grader is used to maintain such inventory piles." Because Kerford did not establish what percentage of the motor grader's total use was devoted to maintaining inventory stockpile areas, the commissioner did not explicitly discuss whether such use was a use in manufacturing under § 77-2701.47. However, the commissioner determined that the motor grader's use to maintain haul roads was not a use in manufacturing. He reasoned that such use was "more in line with the support services that are included in the non-exempt list of assets" in § 77-2701.47(2).

Kerford appealed by filing a petition on appeal and complaint for reversal with the district court. After a hearing, the court reversed the commissioner's order in part, affirmed in part, and remanded for further proceedings. It reversed the

commissioner's determination that Kerford was required to show that the motor grader was used in manufacturing at least 50 percent of the time. Because § 77-2701.47 "includes no language whatsoever specifying—in mathematical terms or otherwise—the amount of time which equipment or machinery must be used in manufacturing to qualify for the exemption," the court found Revenue Ruling 1-05-1 to be "arbitrary" and "wholly unsupported by a plain reading of . . . § 77-2701.47(1)" and declared Revenue Ruling 1-05-1 to be "invalid."

The district court next considered the motor grader's use to maintain haul roads. It affirmed the commissioner's determination that maintaining haul roads was not an exempt use within the plain meaning of § 77-2701.47. The court reasoned that when used to maintain haul roads, the motor grader "neither has direct contact with raw materials, components, or finished products nor is it used to guide, control, operate, or measure the manufacturing process."

Finally, the district court addressed the motor grader's use to maintain inventory stockpile areas. Because the commissioner had not addressed whether such use qualified as a use in manufacturing, the court remanded for further proceedings on this issue. It ordered the commissioner to consider on remand "whether use of the motor grader to maintain inventory piles qualifies the motor grader as 'manufacturing machinery and equipment' under either . . . § 77-2701.47(1)(b) or § 77-2701.47(1)(d)."

The State timely appeals, and Kerford cross-appeals. Pursuant to our statutory authority to regulate the dockets of the appellate courts of this state, we moved the case to our docket. See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

ASSIGNMENTS OF ERROR

The State assigns, restated, that the district court erred in (1) finding invalid the Department's interpretation of § 77-2701.47 that machinery or equipment was not exempt under that statute unless more than 50 percent of the total use was for use in manufacturing; (2) remanding for consideration whether use of the motor grader to maintain inventory

stockpile areas qualified the motor grader as exempt, because the court was not authorized by Neb. Rev. Stat. § 84-917(6)(b) (Cum. Supp. 2012) to make such remand in combination with reversal on another issue; and (3) remanding for a determination whether using the motor grader to maintain inventory stockpile areas qualified the motor grader for an exemption under § 77-2701.47.

On cross-appeal, Kerford assigns, reordered and restated, that the district court erred by (1) determining that use of the motor grader to maintain haul roads was not an exempt use under § 77-2701.47(1)(b), because such conclusion was inconsistent with the statutory language, and (2) giving deference to the commissioner's determination that use of the motor grader to maintain haul roads did not qualify the motor grader for an exemption under § 77-2701.47.

STANDARD OF REVIEW

[1-3] "A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act[, Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 2008, Cum. Supp. 2012, & Supp. 2013),] may be reversed, vacated, or modified by an appellate court for errors appearing on the record." *J.P. v. Millard Public Schools*, 285 Neb. 890, 892, 830 N.W.2d 453, 457 (2013). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.* To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Smalley v. Nebraska Dept. of Health & Human Servs.*, 283 Neb. 544, 811 N.W.2d 246 (2012), *cert. denied* ___ U.S. ___, 133 S. Ct. 1631, 185 L. Ed. 2d 616 (2013).

ANALYSIS

Department's Interpretation of § 77-2701.47

[4,5] The State argues that the district court erred in concluding that the Department's interpretation of § 77-2701.47, embodied in Revenue Ruling 1-05-1, was invalid. This argument presents a question of statutory interpretation, about which we must "reach an independent conclusion irrespective of the decision made by the court below." See *Smalley*, 283 Neb. at 550, 811 N.W.2d at 251. In this examination of the statute, we are governed by the following principles. An appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Holdsworth v. Greenwood Farmers Co-op*, 286 Neb. 49, 835 N.W.2d 30 (2013). When interpreting statutes, an appellate court will not read into a statute a meaning that is not there. *Id.*

The issue is whether Kerford's purchase and use of the motor grader to maintain haul roads and inventory stockpile areas qualified the motor grader as manufacturing machinery and equipment, which machinery and equipment is exempt from sales and use tax under §§ 77-2701.47 and 77-2704.22. Because the motor grader was not a hand tool, office equipment, a vehicle registered for operation on Nebraska roads and highways, or "computers, software, and related peripheral equipment," the motor grader was not specifically excepted from the definition of manufacturing machinery and equipment. See § 77-2701.47(2). Thus, we focus our analysis on the definition provided in § 77-2701.47(1). We also note that the motor grader met the requirement in § 77-2701.47(1) of being purchased by "a person engaged in the business of manufacturing." For purposes of tax exemptions, corporations are included within the statutory definition of "person." See Neb. Rev. Stat. § 77-2701.25 (Reissue 2009). Additionally, the parties stipulated that Kerford is "in the business of manufacturing" and that Kerford purchased the motor grader in that capacity. As

such, the question whether the motor grader is exempt comes down to its use.

In our examination whether the motor grader was exempt, we must consider whether § 77-2701.47(1) required any particular percentage of the motor grader's total use to be in manufacturing in order for the motor grader to qualify as manufacturing machinery and equipment. The Department claimed that § 77-2701.47(1) exempted machinery or equipment only if its use in manufacturing constituted more than 50 percent of the total use. The district court concluded this interpretation was contrary to the plain language of § 77-2701.47(1). We agree.

Section 77-2701.47(1) provides that manufacturing machinery and equipment includes "any machinery or equipment purchased, leased, or rented by a person engaged in the business of manufacturing for use in manufacturing." It does not set forth what percentage of use must be in manufacturing in order for machinery or equipment to be exempt. The plain meaning of the phrase "any machinery or equipment purchased, leased, or rented . . . for use in manufacturing" is that any amount of use in manufacturing brings machinery or equipment within the statutory definition. Thus, to fall within the definition of manufacturing machinery and equipment in § 77-2701.47(1), machinery or equipment purchased by a "person" engaged in the business of manufacturing must meet only one requirement: any amount of its use is in manufacturing.

The statute establishes no requirements on what percentage of total use of machinery or equipment must be "for use in manufacturing" in order for the purchase of such machinery or equipment to be exempt. By requiring machinery and equipment to be used in manufacturing more than 50 percent of the time, the Department added language to its ruling which is not found in § 77-2701.47(1). We will not add a requirement for the exemption that is not there.

[6] But the State argues that the district court's interpretation of § 77-2701.47(1) added language to the statute. We disagree. The absence of any qualifying language in the phrase "any machinery or equipment purchased, leased, or rented . . . for use in manufacturing" indicates that no temporal qualifications

were intended. "[T]he intent of the Legislature may be found through its omission of words from a statute as well as its inclusion of words in a statute." *Lozier Corp. v. Douglas Cty. Bd. of Equal.*, 285 Neb. 705, 714, 829 N.W.2d 652, 660 (2013). Because no time-based qualifications are imposed upon the uses that bring machinery or equipment within the meaning of the definition in § 77-2701.47(1), any amount of use in manufacturing is sufficient.

If the Legislature had intended to impose temporal qualifications upon the language of § 77-2701.47(1) in the manner contemplated by the Department, the Legislature could have provided that to qualify for an exemption, the use of machinery or equipment in manufacturing must be more than 50 percent of the total use. Indeed, similar language is found in other tax exemption provisions. Under Neb. Rev. Stat. § 77-2704.13(1) (Reissue 2003), the purchase of certain energy sources or fuels is exempt from sales and use tax "when more than fifty percent of the amount purchased is for use directly in irrigation or farming." Sections 77-2704.13(1) and 77-2701.47(1) are both located within chapter 77, article 27, of the Nebraska Revised Statutes. The language of the former statute contains a threshold of more than a 50-percent use to qualify for an exemption, but the latter does not mention any time-based thresholds or qualifications.

[7] This fact is a significant indication of the Legislature's intent in enacting § 77-2701.47(1). "We have observed that the 'Legislature is presumed to know the general condition surrounding the subject matter of the legislative enactment, and it is presumed to know and contemplate the legal effect that accompanies the language it employs to make effective the legislation.'" *In re Invol. Dissolution of Wiles Bros.*, 285 Neb. 920, 928, 830 N.W.2d 474, 481 (2013) (quoting *State ex rel. Wagner v. Gilbane Bldg. Co.*, 276 Neb. 686, 757 N.W.2d 194 (2008)). Given that other statutory exemptions from sales and use tax require the exempt use of property to be more than 50 percent of the total use, we interpret the absence of such language in § 77-2701.47(1) to indicate that the Legislature intended to exempt machinery or equipment if it has any amount of use in manufacturing.

The Department's interpretation of § 77-2701.47(1) was contrary to the plain language of the statute. The district court did not err in reversing the commissioner's decision based on such interpretation.

Motor Grader's Use in Manufacturing

The next question is whether Kerford used the motor grader in manufacturing. The parties have stipulated that Kerford is "in the business of manufacturing" pursuant to § 77-2701.47(1) and that Kerford purchased the motor grader in that capacity. The parties also stipulated that Kerford has used the motor grader "to maintain haul roads in and outside of the mine" and to maintain "inventory stockpile areas."

Kerford argues that its stipulated use of the motor grader to maintain inventory stockpile areas qualified as a use in manufacturing under § 77-2701.47(1)(d), which provides that the definition of manufacturing machinery and equipment includes "[m]achinery or equipment for use in manufacturing to maintain the integrity of the product . . . ." Whether the statutory language "to maintain the integrity of the product" encompasses the specific act of maintaining inventory stockpile areas is a question of law.

The commissioner denied Kerford's exemption without specifically addressing whether use of the motor grader to maintain inventory stockpile areas was generally a use in manufacturing or, more specifically, a use that maintained the integrity of the product. He determined that the motor grader's use to maintain haul roads was not a use in manufacturing. But because the commissioner interpreted § 77-2701.47(1) as providing an exemption only if more than 50 percent of the total use was in manufacturing and because Kerford failed to prove that the motor grader's use to maintain inventory stockpile areas met such a threshold, he denied the exemption based on Kerford's lack of proof, without making an explicit finding whether maintaining inventory stockpile areas was a use in manufacturing.

In the absence of an express finding by the commissioner on this issue, the district court did not address whether the motor

grader's use to maintain inventory stockpile areas was a use in manufacturing that exempted the motor grader from taxation. Instead, it remanded this question to the commissioner.

[8] The district court's decision to remand for a determination whether maintaining inventory stockpile areas was an exempt use did not conform to the law. Under § 84-917(5)(a), the district court was required to conduct a review of the commissioner's decision "de novo on the record of the agency." See, also, *Nothnagel v. Neth*, 276 Neb. 95, 752 N.W.2d 149 (2008). In a review de novo on the record, the district court is required to make independent factual determinations based upon the record, and the court reaches its own independent conclusions with respect to the matters at issue. *JCB Enters. v. Nebraska Liq. Cont. Comm.*, 275 Neb. 797, 749 N.W.2d 873 (2008). Once the district court interpreted § 77-2701.47(1) as exempting machinery or equipment with any amount of use in manufacturing, the legal issue before the court was whether maintaining inventory stockpile areas was a use in manufacturing under § 77-2701.47(1)(d).

The district court was faced with not only the legal question whether maintaining inventory stockpile areas was a use in manufacturing but also the commissioner's conclusion on this issue. Although the commissioner did not state whether maintaining inventory stockpile areas was a use in manufacturing, his conclusion on this legal issue was implicit within his order. The commissioner did not expressly find that maintaining inventory stockpile areas was a use in manufacturing but instead focused on whether such use comprised more than 50 percent of the motor grader's total use.

Because the commissioner found Kerford had failed to show that the motor grader's use to maintain inventory stockpile areas was more than 50 percent of the total use, he had to have determined that maintaining inventory stockpile areas was a use in manufacturing. A contrary conclusion would have negated the need to consider whether the maintenance of inventory stockpile areas comprised more than 50 percent of the motor grader's total use. Furthermore, if the commissioner had not concluded that the use to maintain inventory stockpile areas was a use in manufacturing, he would have found that

neither use qualified the motor grader for tax-exempt status. Notably, the commissioner stated that only one of the motor grader's uses—to maintain haul roads—did not qualify as a use in manufacturing. Therefore, the issue and the commissioner's conclusion were directly before the court.

Because the use of the motor grader to maintain inventory stockpile areas was before the district court and because the commissioner implicitly addressed this legal question, the court should have decided this issue upon its de novo review of the record. It was error to remand for further proceedings.

We now decide whether maintaining inventory stockpile areas qualified the motor grader for the manufacturing machinery and equipment exemption. We conclude that such use was an exempt use under § 77-2701.47(1). The motor grader fell within the definition of manufacturing machinery and equipment because it was used "to maintain the integrity of the product." See § 77-2701.47(1)(d).

The "stockpile areas" to which this stipulation referred were piles of rocks that Kerford accumulated when the company produced limestone faster than it could be sold. The piles were separated according to the gradation of the limestone and constituted Kerford's inventory. The parties agree that the motor grader maintained the inventory stockpile areas by pushing rocks that slid off the piles back into the appropriate piles.

Kerford's evidence showed that keeping rocks in piles served two purposes: (1) to keep separation between the piles and (2) to prevent loss of rocks. The State does not dispute these purposes, but describes the motor grader's general function as "cleaning" through the "movement of loose rocks." Brief for appellants at 26.

Whether labeled as cleaning or loss prevention, the motor grader's use around the inventory stockpile areas was a use that maintained the integrity of the product produced by Kerford. A product has integrity when it is in "an unimpaired or unmarred condition" that is in "entire correspondence with an original condition." Webster's Third New International Dictionary of the English Language, Unabridged 1174 (1993). The State proposes a similar definition of integrity—"'sound, unimpaired, or perfect condition.'" Brief for appellants at 26.

Kerford manufactured limestone and limestone aggregate that were sold in bulk and in different sizes. In regard to any particular size of limestone, the aggregate remained in the original and unmarred condition only so long as it stayed grouped with other rocks of the same size. In other words, the integrity of Kerford's product depended upon keeping rocks sorted according to their sizes. Having the motor grader push rocks back into piles ensured both that rocks remained in the appropriate piles according to each rock's size and that customers who ordered limestone of a particular size received rocks of the right gradation. Thus, by keeping the rocks in their respective piles, the motor grader maintained the integrity of Kerford's limestone and limestone aggregate products.

Because Kerford used the motor grader to maintain the integrity of its products as they were stored in inventory stockpiles, the motor grader fell within the definition of manufacturing machinery and equipment in § 77-2701.47(1)(d). As such, under § 77-2704.22, Kerford was entitled to an exemption from sales and use tax on the purchase of the motor grader.

[9] We therefore reverse that portion of the district court's order that remanded this issue for further proceedings before the commissioner. We remand the cause to the district court with direction to enter an order granting Kerford the exemption. Because we reverse the district court's decision to remand, we do not address whether the district court had the authority under § 84-917(6)(b) to order such remand. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it. *Holdsworth v. Greenwood Farmers Co-op*, 286 Neb. 49, 835 N.W.2d 30 (2013).

Cross-Appeal

In its cross-appeal, Kerford alleges the district court's determination that the motor grader's use to maintain haul roads did not entitle Kerford to an exemption was error and should be reversed. Specifically, Kerford argues that this portion of the court's order should be reversed, because in it, the court impermissibly deferred to the commissioner's determination, ignored the evidence, and applied § 77-2701.47(1)(b) in a manner

inconsistent with the statutory language. Kerford asserts that use of the motor grader to maintain haul roads was a use in manufacturing that made the motor grader exempt from sales and use tax.

Whether or not maintaining haul roads was a use in manufacturing, the motor grader was exempt from sales and use tax, because it was used in manufacturing when maintaining inventory stockpile areas. And under § 77-2701.47(1), any amount of use in manufacturing is sufficient to qualify for an exemption.

An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it. *Holdsworth, supra*. Therefore, we do not consider whether the maintenance of haul roads was an exempt use.

CONCLUSION

For the reasons set forth, we affirm the judgment of the district court to the extent it rejected the Department's interpretation of § 77-2701.47 as "wholly unsupported by" the statutory language. However, because Kerford's use of the motor grader to maintain inventory stockpile areas was a use in manufacturing, we reverse that portion of the district court's order that remanded the cause for further proceedings before the commissioner and we remand to the district court with direction to enter an order granting Kerford an exemption from sales and use tax on its purchase of the motor grader. We do not address the district court's determination that use of the motor grader to maintain haul roads was not a use in manufacturing.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTION.

WRIGHT, J., participating on briefs.

C.E., appellant, v. Prairie Fields Family Medicine P.C., appellee.

844 N.W.2d 56

Filed March 14, 2014. No. S-13-455.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Summary Judgment: Final Orders.** A summary judgment order that completely disposes of the subject matter of the case and leaves nothing for the court's determination is final.
4. **Appeal and Error.** Absent plain error, an appellate court considers only an appellant's claimed errors that the appellant specifically assigns in a separate "assignment of error" section of the brief and correspondingly argues in the argument section.
5. **Negligence: Proof.** Identifying a defendant's tortious conduct is crucial to a causal inquiry, but proving tortious conduct is a separate requirement from proving causation.
6. **Summary Judgment: Proof.** A party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that it is entitled to judgment as a matter of law. If the movant meets this burden, then the nonmovant must show the existence of a material issue of fact that prevents judgment as a matter of law.
7. **Summary Judgment: Evidence.** In the face of direct, uncontroverted evidence supporting judgment for the movant, a nonmovant's equivocal statements or speculative assertions do not create a material issue of fact on a disputed ground for summary judgment. The evidence must be sufficient to support an inference in the nonmovant's favor without the fact finder engaging in guesswork.
8. ____: ____. When the parties' evidence would support reasonable, contrary inferences on the issue for which the movant seeks summary judgment, it is an inappropriate remedy.
9. **Negligence.** Where reasonable minds could draw different conclusions from the facts and circumstances presented, a defendant's negligence presents a triable issue of material fact.
10. **Summary Judgment.** At the summary judgment stage, the trial court determines whether the parties are disputing a material issue of fact. It does not resolve the factual issues.
11. **Summary Judgment: Trial.** Summary judgment is an extreme remedy and should not be used to deprive a litigant of a formal trial if there is a genuine issue of material fact.

12. **Negligence: Proof.** A person who alleges negligence of another bears the burden to prove such negligence by direct or circumstantial evidence.

Appeal from the District Court for Dodge County: GEOFFREY C. HALL, Judge. Reversed and remanded for further proceedings.

Christopher A. Pfanstiel and W. Gregory Lake, of Lewis, Pfanstiel & Reed, L.L.C., for appellant.

Earl G. Greene III and Michael T. Gibbons, of Woodke & Gibbons, P.C., L.L.O., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

CONNOLLY, J.

SUMMARY

C.E. appeals the district court's order granting summary judgment to Prairie Fields Family Medicine P.C. (Prairie Fields). C.E. brought claims of intentional and negligent infliction of emotional distress and invasion of privacy. She alleged that a Prairie Fields employee disclosed her positive blood test results for human immunodeficiency virus (HIV) to a third party, which information then spread throughout the Fremont, Nebraska, community where C.E. did business and had friends.

The district court dismissed C.E.'s invasion of privacy claim because it was time barred. Later, it sustained Prairie Fields' summary judgment motion on C.E.'s claims for intentional and negligent infliction of emotional distress. The summary judgment order is the only ruling assigned as error on appeal. The issue is whether C.E. raised a genuine issue of material fact that someone at Prairie Fields disclosed information from her private medical records. We conclude that she did and that the district court erred in sustaining Prairie Fields' motion for summary judgment.

BACKGROUND

In 2010, C.E. went to a diagnostic laboratory in Omaha, Nebraska, to have a physical examination for a life insurance

application, and the laboratory took a blood sample. The laboratory sent the blood sample to another laboratory, which sent the test results directly to C.E.'s physician at Prairie Fields in Fremont. Although C.E. was unsure of the exact date, sometime in September 2010, Prairie Fields arranged for C.E. to come in for a consultation. When C.E. arrived on a Thursday at about 3 or 4 p.m., Kristy Stout-Kreikemeyer, whom C.E. knew from high school, showed C.E. to a room. C.E. said that when she asked about her test results, Stout-Kreikemeyer looked in C.E.'s file, flushed, and responded that she could not say anything. The record shows that a physician's assistant told C.E. about her positive HIV test. C.E. said that she was told the test was inconclusive; she agreed to another test.

C.E. testified that the next day, Friday, at about 7 p.m., Jonathan Karr, the father of one of C.E.'s daughters, called her or sent text messages to ask how she was because he had heard from his friend Jamie Goertz that she had "'Aids, full blown-out Aids.'" C.E. said Karr sent her the text message that he had received from Goertz. But Karr did not know who had given Goertz that information. C.E. had known Goertz since 2001, but she had not recently kept in contact with Karr or Goertz. C.E. said that she called Goertz to find out his source but that Goertz denied knowing anything about her medical condition and denied contacting Karr. Because C.E. had seen Goertz' text message to Karr, she believed that Goertz was lying to protect someone. C.E. had known Goertz since 2001 through his former wife, because C.E. had babysat their children.

On Monday, C.E. called her doctor at Prairie Fields to find out how this information could have been disclosed and asked him to question his staff. The doctor called C.E. later that week and said that none of his staff knew anything about the disclosure. But he assured C.E. that he had locked up her file and directed more training for his staff on privacy laws.

In February 2012, C.E. filed her complaint. C.E. included Stout-Kreikemeyer as a defendant and alleged that she had disclosed C.E.'s test result to a third party. In July, the court sustained Prairie Fields' motion to dismiss C.E.'s invasion of privacy claim because the applicable statute of limitations

barred the claim.[1] In September, Stout-Kreikemeyer testified in a deposition that although she knew C.E. in high school, she did not know Goertz or Karr. In October, in response to interrogatories, C.E. admitted that she was not sure whether Stout-Kreikemeyer was the person who had disclosed the information. She also admitted during her subsequent deposition that she did not know for certain whether Stout-Kreikemeyer or someone else at Prairie Fields had disclosed the information. C.E. believed it could have been Stout-Kreikemeyer because she had seen a social contact between her and Goertz on an Internet social media service.

But C.E. testified that she knew someone at Prairie Fields had disclosed the information. She testified that she had worked in insurance sales and had made specific inquiries. So she knew the life insurance company and the diagnostic laboratory in Omaha would not have received the test results. The Omaha laboratory's staff had told her the procedure is to send an applicant's blood sample to a different laboratory and then the other laboratory electronically sends the test results directly to the applicant's physician so that no one else learns of the results.

C.E. testified that she did not tell anyone about the test result because she believed that the test result was a false positive. She believed this because her doctor had told her that other antibodies could cause a false positive result and because she had a family history of autoimmune conditions.

After Prairie Fields deposed C.E. and she answered interrogatories, she learned through a discovery request that Sara Sorensen worked at Prairie Fields as a medical transcriptionist. Sorensen was Goertz' former wife, and C.E. believed that Sorensen had disclosed the test results to him. Prairie Fields stipulated that Sorensen had transcribed C.E.'s medical records.

In Goertz' deposition, he said that he and Sorensen had many contacts with C.E. beginning in 2000 or 2001 and that C.E. was around them a lot when their children were young. He said he heard a rumor while he was at a bar one afternoon

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[1] See Neb. Rev. Stat. § 20-211 (Reissue 2012).

that C.E. had contracted HIV. He initially said that he could not remember who had told him the rumor but then said he had overheard two unknown men talking about it. He denied hearing the rumor from Sorensen. He said that he told Karr about the rumor after Karr mentioned C.E. during a conversation. But after C.E.'s attorney informed Goertz that he had a subpoena for Goertz' telephone records, Goertz said that he had called Karr. According to Goertz, he told Karr that he had heard a rumor that C.E. had HIV and recommended that Karr get tested.

In Sorensen's deposition, she admitted that she knew C.E. in 2001 because she was dating Goertz, who was a long-time friend of Karr, and C.E. was dating Karr. She admitted that the two couples had socialized. She said that Karr even lived with her and Goertz for a couple of months around the time that they separated in 2004. But Sorensen said that C.E. had babysat their children only a few times and that she did not know her well. She said that when she typed C.E.'s medical records, she did not associate C.E. with the test results and did not know the test results were C.E.'s until months later when Sorensen's supervisor and two physicians at Prairie Fields questioned her about the disclosure. She admitted that Prairie Fields likely would have fired her if she had reported disclosing a patient's medical records. Sorensen stated she had never heard a rumor that C.E. had contracted HIV. She denied contacting Goertz to discuss C.E.'s medical history.

In April 2013, the court heard Prairie Fields' motion for summary judgment and to dismiss C.E.'s complaint with prejudice. According to the parties' statements, C.E. had moved to add a new defendant. But Prairie Fields argued that the court need not address that motion if the court sustained its motion for summary judgment. The parties agreed to dismiss Stout-Kreikemeyer from the action.

The court couched its order in terms of causation but focused on C.E.'s failure to create an issue of fact that someone from Prairie Fields had disclosed her diagnosis to a third party:

> [Prairie Fields] introduced substantial competent evidence to establish a prima faci[e] showing that there

> is a lack of causation by [Prairie Fields] or its agents related to any claim for damages made by [C.E.] in this case. Thus, the Court looks to [C.E.] to produce competent evidence in order to create an issue of material fact, which would allow [C.E.] to avoid summary judgment. . . .
>
> The Court, in reviewing the entire evidentiary record submitted, in a light most favorable to [C.E.], can find no **competent** evidence from [C.E.], which indicates that [Prairie Fields] or its agents [were] somehow negligent and that said negligence caused some type of damage/injury to [C.E.]
>
> In reaching this decision, the Court finds persuasive the deposition testimony of the relevant witnesses involved in this case which is uncontroverted that the disclosed information did not come from an agent of [Prairie Fields]. Further, [C.E.] in her deposition testified that she did not know who disclosed this information. . . . It is well settled Nebraska law that a claim cannot stand when it is based merely on speculation or conjecture. . . .
>
> [Prairie Fields] has made a prima facie showing that there is a lack of causation related to [Prairie Fields]. [C.E.], on the other hand, has failed to bring forth competent evidence to prove more likely than not that [Prairie Fields] or its agents were somehow the proximate cause of some injury or damage to [C.E.]

The court concluded that Prairie Fields was entitled to judgment as a matter of law.

ASSIGNMENT OF ERROR

C.E. assigns that the court "erred in failing to find there was a question of fact as to whether [C.E.] established proximate causation between Prairie Fields' negligence and damage to [C.E.]"

STANDARD OF REVIEW

[1,2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts

or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.[2] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.[3]

ANALYSIS

C.E. contends that the court erred in concluding that no issue of fact existed whether Prairie Fields or its agents had disclosed her medical diagnosis to a third party. Conversely, Prairie Fields contends that C.E.'s circumstantial evidence was insufficient to show that an employee of Prairie Fields disclosed her diagnosis.

[3] Initially, we clarify that Prairie Fields' motion for summary judgment was effectively a request for judgment on any remaining claim in C.E.'s complaint. And the court's order stated that C.E. had failed to show causation for *any* claim of damages that she had against Prairie Fields or its agents. So we interpret the court's order as sustaining Prairie Fields' motion for summary judgment on C.E.'s two remaining claims: both intentional and negligent infliction of emotional distress. Because the summary judgment order completely disposed of the subject matter of the case and left nothing for the court's determination, it was final.[4]

[4] Next, we clarify that we are not addressing C.E.'s argument that Prairie Fields' alleged disclosure of her medical diagnosis was an invasion of her privacy. The court dismissed C.E.'s invasion of privacy claim as time barred, and C.E. does not assign error to that ruling. Absent plain error, an appellate court considers only an appellant's claimed errors that the appellant specifically assigns in a separate "assignment of

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[2] *Selma Development v. Great Western Bank*, 285 Neb. 37, 825 N.W.2d 215 (2013).

[3] *Id.*

[4] See *Big John's Billiards v. State*, 283 Neb. 496, 811 N.W.2d 205 (2012).

error" section of the brief and correspondingly argues in the argument section.[5] We do not find plain error in the ruling.

[5] Finally, we clarify the issue to be decided in this appeal. The court incorrectly characterized the parties' factual dispute as relevant to the element of causation. It specifically concluded that C.E.'s claims were speculative because she adduced no evidence showing that someone at Prairie Fields had disclosed her diagnosis, in contrast to the defendants' uncontroverted evidence that Prairie Fields' employees did not disclose the information. This is the crux of the parties' arguments on appeal. But for both of C.E.'s tort claims, whether someone at Prairie Fields disclosed her diagnosis was relevant to her burden of proving tortious conduct. Identifying a defendant's tortious conduct is crucial to a causal inquiry, but proving tortious conduct is a separate requirement from proving causation.[6] Here, the parties are disputing the tortious conduct element—whether there was an unlawful disclosure. With these clarifications, we turn to the standards that govern summary judgment.

[6] A party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that it is entitled to judgment as a matter of law.[7] If the movant meets this burden, then the nonmovant must show the existence of a material issue of fact that prevents judgment as a matter of law.[8]

[7] In the face of direct, uncontroverted evidence supporting judgment for the movant, a nonmovant's equivocal statements or speculative assertions do not create a material

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[5] *In re Interest of Landon H.*, *ante* p. 105, 841 N.W.2d 369 (2013).

[6] See, *Blaser v. County of Madison*, 285 Neb. 290, 826 N.W.2d 554 (2013); *Kozicki v. Dragon*, 255 Neb. 248, 583 N.W.2d 336 (1998); Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 26, comment *h.* (2010); 65 C.J.S. *Negligence* § 190 (2010).

[7] See *Peterson v. Homesite Indemnity Co.*, *ante* p. 48, 840 N.W.2d 885 (2013).

[8] See *id.*

issue of fact on a disputed ground for summary judgment.[9] The evidence must be sufficient to support an inference in the nonmovant's favor without the fact finder engaging in guesswork.[10]

[8-11] But when the parties' evidence would support reasonable, contrary inferences on the issue for which a movant seeks summary judgment, it is an inappropriate remedy.[11] As we have stated many times, where reasonable minds could draw different conclusions from the facts and circumstances presented, a defendant's negligence presents a triable issue of material fact.[12] At the summary judgment stage, the trial court determines whether the parties are disputing a material issue of fact. It does not resolve the factual issues.[13] Summary judgment is an extreme remedy and should not be used to deprive a litigant of a formal trial if there is a genuine issue of material fact.[14]

C.E. argues that her claim necessarily relied on circumstantial evidence and that the court erred in failing to find that such evidence was sufficient to create an issue of fact whether Sorensen had disclosed C.E.'s positive HIV test. She argues that only a person who worked at Prairie Fields could have learned this information and disclosed it to a third party. She further argues that the court erred in relying on her lack of knowledge about the source of the disclosure in her deposition

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[9] See *Shipley v. Department of Roads*, 283 Neb. 832, 813 N.W.2d 455 (2012).

[10] See *Parker v. Lancaster Cty. Sch. Dist. No. 001*, 256 Neb. 406, 591 N.W.2d 532 (1999).

[11] See, *Farmington Woods Homeowners Assn. v. Wolf*, 284 Neb. 280, 817 N.W.2d 758 (2012); *Richards v. Meeske*, 268 Neb. 901, 689 N.W.2d 337 (2004); *Parker, supra* note 10.

[12] See, e.g., *Harrison v. Seagroves*, 250 Neb. 495, 549 N.W.2d 644 (1996); *Pearson v. Richard*, 201 Neb. 621, 271 N.W.2d 326 (1978).

[13] See *Woodhouse Ford v. Laflan*, 268 Neb. 722, 687 N.W.2d 672 (2004).

[14] See *Green v. Box Butte General Hosp.*, 284 Neb. 243, 818 N.W.2d 589 (2012).

and answers to interrogatories because she did not then know about Sorensen's employment with Prairie Fields.

[12] A person who alleges negligence of another bears the burden to prove such negligence by direct or circumstantial evidence.[15] In *Parker v. Lancaster Cty. Sch. Dist. No. 001*,[16] a premises liability case, we held that the circumstantial evidence was sufficient to support an inference that the defendant's negligence had caused the plaintiff's fall. We reached this conclusion even though the plaintiff had stated in a deposition that she was unsure what had caused her fall. We acknowledged that this statement, standing alone, would support an inference that the cause of her fall was unknown. But immediately after the fall, the plaintiff had reported that she did not see a step. Other evidence established that the plaintiff was mentally alert and that the steps presented a risk to visitors. We concluded that the circumstantial evidence was sufficient to support a reasonable inference in the plaintiff's favor that she fell because the step was not plainly visible.

Although the issue in Parker was causation, the same reasoning regarding circumstantial evidence applies here. And giving C.E. the benefit of all reasonable inferences, the circumstantial evidence that she presented was sufficient to support an inference in her favor.

To recap, C.E. testified that Karr contacted her on Friday night—after she had learned about the positive results in the late afternoon on Thursday. Goertz admitted that he called Karr about C.E.'s contracting HIV. It is true Goertz testified that he overheard a rumor to this effect from strangers while at a bar around 1 or 2 p.m. He did not remember what day he purportedly heard this rumor in a bar. But if a trier of fact believed C.E.'s testimony, then Goertz heard a rumor about C.E.'s contracting HIV less than 24 hours after C.E. learned the test results herself and despite her not disclosing the information to anyone else. And Prairie Fields did not present evidence to refute C.E.'s testimony that no one at the Omaha diagnostic

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[15] *Herrera v. Fleming Cos.*, 265 Neb. 118, 655 N.W.2d 378 (2003), citing *Bargmann v. Soll Oil Co.*, 253 Neb. 1018, 574 N.W.2d 478 (1998).

[16] *Parker, supra* note 10.

laboratory or insurance company would have known about her test results.

The court incorrectly concluded that the testimony of Prairie Fields' witnesses was uncontroverted. If Sorensen and Goertz truthfully stated that Sorensen did not disclose C.E.'s diagnosis to Goertz, then C.E. must be lying that Goertz contacted Karr the day after C.E. learned about the positive test result, despite C.E.'s not disclosing her diagnosis to anyone. Conversely, if C.E.'s testimony is believed, then the most probable explanation for Goertz' learning about her diagnosis so quickly—whether from overhearing a rumor or speaking directly to Sorensen—is that someone at Prairie Fields disclosed it to a third party. Prairie Fields argues that C.E. could have disclosed her diagnosis to her boyfriend and that Goertz could have overheard the boyfriend repeating the rumor the next day in a bar. But C.E. testified that she did not tell anyone about her diagnosis, and the court was required to give her all reasonable inferences based on that testimony.

Alternatively, Prairie Fields argues that under our case law, circumstantial evidence must meet a higher standard than direct proof in negligence cases. It relies on *Herrera v. Fleming Cos.*,[17] a 2003 case in which we stated that "[w]hile circumstantial evidence may be used to prove causation, the evidence must be sufficient to fairly and reasonably justify the conclusion that the defendant's negligence was the proximate cause of the plaintiff's injury." It also relies on our statement in *Ditloff v. State Farm Fire & Cas. Co.*[18] that circumstantial evidence must "'"make the plaintiffs' theory of causation reasonably probable, not merely possible."'"

We acknowledge that some of our civil cases have not treated circumstantial and direct evidence equally.[19] In fact, we recognized this tension in *Ditloff*.[20] But we need not

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[17] *Herrera*, *supra* note 15, 265 Neb. at 123, 655 N.W.2d at 383.

[18] *Ditloff v. State Farm Fire & Cas. Co.*, 225 Neb. 375, 379, 406 N.W.2d 101, 104 (1987).

[19] See NJI2d Civ. 1.31, comment III. Compare *State v. Pierce*, 248 Neb. 536, 537 N.W.2d 323 (1995).

[20] See *Ditloff*, *supra* note 18.

address whether the statements that Prairie Fields relies on impose a higher burden of production for circumstantial evidence in civil cases generally, because they are not applicable here. Our statement in *Herrera* was limited to proof of causation by circumstantial evidence. As explained, the issue here is proof of tortious conduct, not causation. And the dispute in *Ditloff* was over a directed verdict, not a summary judgment order.

As stated, the issue here is whether the evidence presented—viewed in the light most favorable to C.E. and giving her all reasonable inferences—would support an inference in her favor, without engaging in guesswork, that a Prairie Fields employee disclosed her HIV diagnosis to a third party. We conclude that C.E.'s evidence was sufficient to show that Prairie Fields was not entitled to judgment as a matter of law. The court erred by concluding C.E. presented no competent evidence that a Prairie Fields employee had disclosed her diagnosis. Moreover, the court incorrectly stated that her evidence must show it was more likely than not that a Prairie Fields employee had disclosed her diagnosis. A court does not weigh the evidence at the summary judgment stage.

CONCLUSION

Because reasonable minds could draw contrary conclusions from the evidence presented, Prairie Fields did not show that it was entitled to judgment as a matter of law. We therefore reverse the court's summary judgment order and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STEPHAN, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. VICTOR VELA-MONTES, APPELLANT.

844 N.W.2d 286

Filed March 21, 2014. No. S-12-589.

1. **Judgments: Speedy Trial: Appeal and Error.** As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Speedy Trial.** The statutory right to a speedy trial is set forth in Neb. Rev. Stat. §§ 29-1207 and 29-1208 (Cum. Supp. 2012).
3. ____. To calculate the deadline for trial under the speedy trial statutes, a court must exclude the day the State filed the information, count forward 6 months, back up 1 day, and then add any time excluded under Neb. Rev. Stat. § 29-1207(4) (Cum. Supp. 2012).
4. **Speedy Trial: Waiver.** The statutory right to a speedy trial is not unlimited and can be waived.
5. **Speedy Trial: Waiver: Appeal and Error.** A defendant's motion to discharge based on statutory speedy trial grounds will be deemed to be a waiver of that right under Neb. Rev. Stat. § 29-1207(4)(b) (Cum. Supp. 2012) where (1) the filing of such motion results in the continuance of a timely trial to a date outside the statutory 6-month period, as calculated on the date the motion to discharge was filed, (2) discharge is denied, and (3) that denial is affirmed on appeal.
6. **Speedy Trial: Waiver.** Once a defendant has waived his statutory right to a speedy trial, an exact calculation of days remaining on the speedy trial clock is no longer required.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Motion for rehearing sustained. Affirmed.

Daniel R. Stockmann, of Dunn & Stockmann, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

In June 2012, Victor Vela-Montes filed his second motion to discharge based upon the statutory right to a speedy trial. After the district court overruled the motion, Vela-Montes appealed.

However, while the appeal was pending, he moved to withdraw and dismiss the appeal. We dismissed Vela-Montes' appeal upon his motion without determining how much time remained on the speedy trial clock.

The State sought rehearing due to our failure to address how much time remained on Vela-Montes' speedy trial clock. We sustained the State's motion for rehearing. We now conclude that Vela-Montes waived his statutory right to a speedy trial and that there was no need to calculate the time remaining to bring him to trial. We affirm the dismissal of Vela-Montes' appeal.

SCOPE OF REVIEW

[1] As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *State v. Mortensen, ante* p. 158, 841 N.W.2d 393 (2014).

FACTS

On February 26, 2009, Vela-Montes was charged with two counts of first degree sexual assault. Trial was set for February 1, 2010, but on January 19, Vela-Montes filed a motion for discharge based upon his statutory right to a speedy trial. The district court overruled the motion.

As a result of the district court's decision to overrule Vela-Montes' first motion to discharge, two appeals were filed in the Court of Appeals. The first appeal, *State v. Vela-Montes*, No. A-10-106, was summarily remanded on July 7, 2010, to the district court with direction that the court make "specific findings of each period of delay excludable under Neb. Rev. Stat. § 29-1207(4)(a) to (f) [(Cum. Supp. 2012)]." After the district court made its findings, Vela-Montes appealed again. In *State v. Vela-Montes*, 19 Neb. App. 378, 807 N.W.2d 544 (2011), the Court of Appeals affirmed the district court's denial of absolute discharge and held that 45 days remained on the speedy trial clock. We granted a petition for further review, and we affirmed without opinion. See *State v. Vela-Montes*, 283 Neb. 530, 810 N.W.2d 749 (2012). The mandate on our decision was issued on April 4, 2012, and was filed with the clerk

of the district court on April 9. On May 4, the district court entered an order on the mandate.

On May 16, 2012, the district court set the matter for trial on June 11. But on June 1, Vela-Montes filed a second motion for discharge. He alleged that the 45 days remaining on his speedy trial clock would expire before his trial. The court determined that the June 11 trial date was within the 45 days remaining on the speedy trial clock and overruled Vela-Montes' motion.

Vela-Montes appealed the district court's denial of his second motion to discharge. While the appeal was pending, both parties separately moved to dismiss the appeal. In October 2012, the State moved for summary dismissal, arguing that the appeal was frivolous and should not affect the speedy trial clock. This motion was overruled. Later, in January 2013, Vela-Montes moved to withdraw and dismiss his appeal. In the motion, Vela-Montes stated, "After review of the record and relevant case law, Appellant acknowledges that this appeal is no longer meritorious and wishes to withdraw it from the appellate docket." We sustained Vela-Montes' motion to dismiss with the following order: "Motion of appellant to dismiss appeal sustained; appeal dismissed; mandate to issue accordingly." We did not determine how much time remained on the speedy trial clock.

The State timely moved for rehearing of Vela-Montes' motion to dismiss. No response was filed by Vela-Montes. We sustained the State's motion for rehearing. Pursuant to Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), the case was submitted without oral argument.

ASSIGNMENT OF ERROR

The State claims we erred by failing to address how much time remained on Vela-Montes' speedy trial clock after the dismissal of an admittedly nonmeritorious interlocutory speedy trial appeal.

ANALYSIS

[2,3] The statutory right to a speedy trial is set forth in Neb. Rev. Stat. §§ 29-1207 and 29-1208 (Cum. Supp. 2012). *State v. Brooks*, 285 Neb. 640, 828 N.W.2d 496 (2013). Under

§ 29-1207(1), "[e]very person indicted or informed against for any offense shall be brought to trial within six months, and such time shall be computed as provided in this section." To calculate the deadline for trial under the speedy trial statutes, a court must exclude the day the State filed the information, count forward 6 months, back up 1 day, and then add any time excluded under § 29-1207(4). *Brooks, supra*. If a defendant is not brought to trial before the running of the time for trial as provided for in § 29-1207, as extended by excluded periods, he or she shall be entitled to his or her absolute discharge from the offense charged and for any other offense required by law to be joined with that offense. § 29-1208.

[4] The statutory right to a speedy trial is not unlimited and can be waived. *State v. Mortensen, ante* p. 158, 841 N.W.2d 393 (2014). One form of waiver is provided in § 29-1207(4)(b), which states in part that "[a] defendant is deemed to have waived his or her right to speedy trial when the period of delay resulting from a continuance granted at the request of the defendant or his or her counsel extends the trial date beyond the statutory six-month period." The waiver in § 29-1207(4)(b) is a permanent waiver of the statutory right to a speedy trial. See *Mortensen, supra*.

[5] In *Mortensen, ante* at 167, 841 N.W.2d at 401, this court determined that the waiver in § 29-1207(4)(b) extended to "a continuance necessitated by a defendant's motion to discharge where the continuance has the effect of moving trial beyond the statutory 6-month period." Accordingly, we held that

> a defendant's motion to discharge based on statutory speedy trial grounds will be deemed to be a waiver of that right under § 29-1207(4)(b) where (1) the filing of such motion results in the continuance of a timely trial to a date outside the statutory 6-month period, as calculated on the date the motion to discharge was filed, (2) discharge is denied, and (3) that denial is affirmed on appeal.

Mortensen, ante at 169-70, 841 N.W.2d at 402-03.

Vela-Montes' first motion to discharge was filed before § 29-1207(4)(b) became operative on July 15, 2010. See 2010 Neb. Laws, L.B. 712, § 15. Thus, that motion could not waive

his statutory right to a speedy trial in the manner established by *Mortensen, supra*. However, we find that Vela-Montes waived his statutory right to a speedy trial with his second motion to discharge, which was filed after the operative date of § 29-1207(4)(b).

Vela-Montes initially appealed the district court's decision to overrule his second motion to discharge. Before the Court of Appeals ruled on the appeal, he moved to have the appeal withdrawn and dismissed. On rehearing of that dismissal, we now affirm the district court's denial of discharge for the reason that Vela-Montes' second motion to discharge did not demonstrate that he had been denied a speedy trial.

In Vela-Montes' second motion to discharge, he argued that the 45 days remaining on his speedy trial clock ran out on May 24, 2012, and that his trial scheduled for June 11 was thus untimely. But these arguments had merit only if, after the appellate proceedings surrounding Vela-Montes' first motion to discharge, the speedy trial clock started to run again on April 9, the day the Court of Appeals' mandate was filed in the district court.

We have previously held that "[w]here further proceedings are to be had following an interlocutory appeal, for speedy trial purposes, the period of time excludable due to the appeal concludes when the district court first reacquires jurisdiction over the case by taking action on the mandate of the appellate court." See *State v. Williams*, 277 Neb. 133, 141-42, 761 N.W.2d 514, 523 (2009). Accordingly, Vela-Montes' speedy trial clock did not start to run again until May 4, when the district court entered its order on the appellate mandate. Using this date as the basis for the speedy trial calculation, when Vela-Montes filed his second motion to discharge on June 1, there were still 17 days remaining for the State to bring him to trial. Because Vela-Montes' speedy trial rights were not violated, we affirm the denial of his second motion to discharge.

In addition to resulting in the denial of discharge, Vela-Montes' second motion to discharge necessitated the continuance of trial from a date within the statutory 6-month period to a date outside the 6-month period, as calculated on

the date he filed the motion. Vela-Montes' second motion continued the trial scheduled for June 11, 2012. The district court overruled the motion, and we affirmed the denial of discharge, because when Vela-Montes filed his motion, there were 17 days remaining on the speedy trial clock, or until June 18. The continuance necessitated by Vela-Montes' motion is still in effect pending resolution of this appeal and has moved his trial well beyond the 17 days remaining when he filed the motion. Because Vela-Montes' second motion to discharge resulted in the continuance of a timely trial to a date outside the statutory 6-month period, as calculated on the date the motion to discharge was filed, and because discharge was denied and that denial was affirmed on appeal, we conclude that Vela-Montes has waived his statutory right to a speedy trial.

[6] In *State v. Mortensen*, *ante* p. 158, 170, 841 N.W.2d 393, 403 (2014), we held that once a defendant has waived his statutory right to a speedy trial, "an exact calculation of days remaining on the speedy trial clock is no longer required." Therefore, in light of Vela-Montes' waiver, it was not necessary to calculate the amount of time remaining to bring Vela-Montes to trial under § 29-1207. Thus, when the district court reacquires jurisdiction over the cause, the court shall set a date to bring Vela-Montes to trial.

CONCLUSION

Because Vela-Montes waived his statutory right to a speedy trial, we affirm the order of the district court which overruled Vela-Montes' motion for discharge. The judgment of the district court is affirmed.

AFFIRMED.

CASSEL, J., not participating.

IN RE INTEREST OF NICOLE M., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE, V. BRANDY S., APPELLANT, AND THOMAS M., APPELLEE AND CROSS-APPELLANT.

IN RE INTEREST OF SANDRA M., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE, V. BRANDY S., APPELLANT, AND THOMAS M., APPELLEE AND CROSS-APPELLANT.

844 N.W.2d 65

Filed March 21, 2014. Nos. S-13-354, S-13-355.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
2. **Parental Rights: Proof.** Under Neb. Rev. Stat. § 43-292 (Cum. Supp. 2012), in order to terminate parental rights, the State must prove, by clear and convincing evidence, that one or more of the statutory grounds listed in this section have been satisfied and that termination is in the child's best interests.
3. **Constitutional Law: Parental Rights.** The proper starting point for legal analysis when the State involves itself in family relations is always the fundamental constitutional rights of a parent.
4. **Constitutional Law: Parental Rights: Proof.** A parent's right to raise his or her child is constitutionally protected; as such, before a court may terminate parental rights, the State must also show that the parent is unfit.
5. **Parental Rights: Presumptions: Proof.** There is a rebuttable presumption that the best interests of a child are served by having a relationship with his or her parent. Based on the idea that fit parents act in the best interests of their children, this presumption is overcome only when the State has proved that a parent is unfit.
6. **Parental Rights: Statutes: Words and Phrases.** The term "unfitness" is not expressly used in Neb. Rev. Stat. § 43-292 (Cum. Supp. 2012), but the concept is generally encompassed by the fault and neglect subsections of that statute, and also through a determination of the children's best interests.
7. **Constitutional Law: Parental Rights: Courts: Words and Phrases.** In discussing the constitutionally protected relationship between a parent and a child, the Nebraska Supreme Court has stated parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which caused, or probably will result in, detriment to a child's well-being.

8. **Parental Rights.** The best interests analysis and the parental fitness analysis are fact-intensive inquiries. And while both are separate inquiries, each examines essentially the same underlying facts as the other.
9. **Parental Rights: Proof.** The fact that a child has been placed outside the home for 15 or more of the most recent 22 months does not demonstrate parental unfitness. Instead, the placement of a child outside the home for 15 or more the most recent 22 months under Neb. Rev. Stat. § 43-292(7) (Cum. Supp. 2012) merely provides a guideline for what would be a reasonable time for parents to rehabilitate themselves to a minimum degree of fitness.
10. ____: ____. Regardless of the length of time a child is placed outside the home, it is always the State's burden to prove by clear and convincing evidence that the parent is unfit and that the child's best interests are served by his or her continued removal from parental custody.
11. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.

Appeals from the County Court for Buffalo County: GRATEN D. BEAVERS, Judge. Affirmed in part, and in part reversed.

Stephen G. Lowe for appellant.

Mandi J. Amy, Deputy Buffalo County Attorney, for appellee State of Nebraska.

John M. Jensen, of Yeagley, Swanson & Murray, L.L.C., for appellee Thomas M.

Michele J. Romero, of Stamm, Romero & Associates, P.C., L.L.O., guardian ad litem for children.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

HEAVICAN, C.J.

I. INTRODUCTION

The county court for Buffalo County, sitting as a juvenile court, terminated the parental rights of Thomas M. (Tom) and Brandy S. to their children Nicole M. and Sandra M. Brandy appeals, and Tom cross-appeals. We affirm in part, and in part reverse.

II. FACTUAL BACKGROUND

Tom and Brandy are the biological parents of Nicole, born in October 2004, and Sandra, born in January 2006. Tom

is employed as a maintenance worker at a trailer court in Kearney, Nebraska, where he, Brandy, and the children live. Brandy is sporadically employed and has recently worked as a hotel housekeeper and in the fast-food industry. Tom and Brandy are not married.

1. Events Leading to Adjudication

On March 28, 2011, Nicole and Sandra were removed from the family home due to its unsanitary condition. As early as July 2008, law enforcement had investigated the family due to similar allegations, as well as to injuries sustained by Nicole. Voluntary services had been provided to the family prior to the children's removal.

A petition to adjudicate was filed on March 29, 2011, and the children were adjudicated on April 6. The children were moved to a foster placement.

2. Adjustment to Foster Home and Reports of Prior Abuse

Upon entering the foster home, the children reportedly suffered from nightmares, bed-wetting, recurrent head lice, and poor hygiene practices.

Initially, the children's foster parents encouraged an open relationship with Tom and Brandy. But that openness ended when Brandy began having trouble with boundaries. Even after being instructed to stop contacting the foster mother, Brandy continued to do so.

While in the foster home, further details of Nicole's and Sandra's lives were revealed. First, Nicole told her foster mother that her home was unsafe and that Tom and Brandy fought a lot. Nicole also told her foster mother that Brandy made verbal threats against them. Most notably, according to Nicole, Brandy had threatened to stab the children while they slept. The children's foster mother also testified that the children told her Brandy physically abused them. Information from the foster mother states that in May 2012, Nicole told her that "'Mommy is nice if people are around but when she gets us alone she is mean.'"

In addition, the children told their foster mother that they had both been sexually assaulted by a friend of Brandy's.

Brandy informed the children's therapist, Pamela Trantham, of this abuse. Upon further investigation, the person accused admitted the allegations and has since been convicted of third degree sexual assault of a child. It was also suggested that Tom and Brandy were aware of the assaults but did not report them to law enforcement because they did not wish the children to have to testify against the perpetrator.

In addition to Brandy's being aware of the allegations, there is some evidence in the record to suggest that Brandy took the children to the jail to visit the perpetrator after becoming aware of the abuse.

3. Visitation

For most of the children's time in out-of-home placement, there has been supervised visitation with Tom and Brandy. There was a brief period of semisupervised or unsupervised visitation in the summer of 2011. There were reports that during that period of time, each of the children experienced issues with hygiene, including dirty clothes, face, and hair, and not having a toothbrush or brushing their teeth for an entire weekend visitation.

More significantly, Nicole reported that during this unsupervised visitation, Brandy physically abused the children. Nicole further reported that Brandy told her not to tell anyone about the abuse or the children would not get to go home. According to Trantham, Nicole indicated that Tom and Brandy would get into fights during visitation. This allegation was confirmed in at least one instance by the family support worker.

Tom and Brandy denied that abuse was occurring at visitation. Tom testified that he did not see any fear on the part of the children during unsupervised visitation and that the children appeared to not want to leave visitation.

The children's foster mother testified that she noticed a high level of anxiety and fighting between the children around the time of visitation with Tom and Brandy and that it took a few days to get the children back into a routine after a visit.

Notwithstanding the abuse allegations, the children were generally happy to see Tom and Brandy during visitation and the visits were largely harmonious. However, there were issues.

For example, the family support worker reported that Brandy left dirty dishes in the sink with the expectation that Nicole and Sandra would wash them during their visit. There was also evidence that Brandy was not always interested in parenting during her visitation with the children. One family support worker testified that Brandy "often put her other friends and relatives ahead of her visits" with the children.

4. Nicole's Counseling

After the children's removal, both began counseling with Trantham. Nicole had been diagnosed with posttraumatic stress disorder and adjustment disorder. Initially, Nicole made progress with her counseling. But in March 2012, Brandy, who had been transporting the children to their therapy appointments, began pressuring Nicole to ask for resumption of unsupervised visitation. This caused Nicole to disassociate, including experiencing problems sleeping, impaired concentration, and auditory hallucinations telling her to harm her foster mother.

During Nicole's therapy, she also expressed fear over being alone with Brandy and was generally an anxious child. Nicole did have some issues with lying, although Trantham indicated that she was not concerned with this issue, given Nicole's age. Nicole was eventually medicated to help control her anxiety and other symptoms.

Trantham testified that Nicole was very intelligent, presented much older than her age, and exhibited much responsibility for Sandra. Trantham reported that Nicole understood how the foster care and court processes worked, including the roles of the various individuals involved.

According to Trantham, Nicole reported during her therapy sessions that Brandy had physically abused her when she and Sandra lived at home as well as during visitation. Nicole reported that, generally, when the abuse occurred, Tom would tell Brandy to stop. There is at least some evidence in the record that Nicole also reported Tom would pull her hair, though details of this allegation are not clear.

The record includes a letter written by Nicole to her guardian ad litem requesting that she not be made to see Brandy

in an unsupervised setting. But while Nicole did not wish to see Brandy in an unsupervised setting, Trantham reported that Nicole suffered from guilt as a result of her reporting the visitation abuse, because Nicole loved Tom and Brandy and wanted to see them.

Trantham also testified about Nicole's fear of Brandy and of returning home. According to Trantham and others, Nicole feared that Brandy would sneak into her bedroom at her foster home and hurt her. This issue was alleviated when her foster father placed "'special tape'" over the window, which he explained would keep her safe.

5. Sandra's Therapy

Sandra also engaged in therapy. She was diagnosed with an adjustment disorder, and according to Trantham, she might also have "reactive attachment" disorder. Sandra did not progress in therapy as well as Nicole did.

Trantham testified that Sandra had anger issues, as well as trust issues, with adults. This seemed to be reflected in her relationship with her foster mother, who often seemed to bear the brunt of Sandra's anger. But on other occasions, Sandra seemed to make strides in her relationship with her foster mother and with Trantham. Toward the end of one of her counseling sessions, Sandra asked her foster mother what she, Sandra, had done wrong to prevent her from going home. According to Trantham's notes, during that session, Sandra was reassured that it was not her fault and Sandra "was able to identify that her 'mom and dad never came back,'" presumably referring to the fact that Tom and Brandy had not done what was necessary to reunify the family.

6. Recommendations Regarding Family Therapy and Reunification

Trantham indicated that she would not recommend family therapy for Tom, Brandy, and the children, because

> when you have a situation where you have a victim and a perpetrator of any type of abuse, you do not put those two together until the perpetrator has experienced some sort of treatment. And that should generally mean that [he or

> she can] accept responsibility for [his or her] role and that [the perpetrator] can demonstrate some remorse.
>
> Now, if you do that before those goals have been met, then the bulk of the responsibility shifts right back to the victim. And you run the risk of further marginalizing and victimizing that child or battered woman or whoever the case may be.

Trantham believed, based upon her interactions with Tom and Brandy at team meetings, and based upon conversations with Brandy's former therapist, that neither Tom nor Brandy had taken responsibility sufficient to proceed to family therapy.

Brandy's initial therapist, Amy Eigenberg, also testified that as of the time that Brandy stopped seeing her, Eigenberg would not yet have recommended family therapy. One of the main reasons for this lack of recommendation was Brandy's failure to take responsibility for hitting Nicole during unsupervised visitation.

But Kathleen White, Brandy's most recent therapist, testified that she believed family therapy should be attempted and that one should determine why the children were not ready and "attempt to make them ready." White indicated that she would support family therapy even if the children's fear was initially caused by the parent. White acknowledged, however, that she had not communicated with Trantham regarding the children's therapy. When asked, White also admitted that she would not perform couples' therapy with a domestic violence victim where the abuser had not taken responsibility for the abuse.

Trantham testified that reunification, up to that point, had not been possible; that she felt it was in the children's best interests not to return to Tom and Brandy's home; and that instead, Tom's and Brandy's parental rights should be terminated. Trantham did testify, however, she felt that even post-termination, there should be contact between Tom, Brandy, and the children.

7. Brandy's Counseling

Brandy also attended counseling. Initially, Brandy voluntarily underwent therapy with Eigenberg beginning on

February 15, 2010. When Brandy began counseling with Eigenberg, on the Department of Health and Human Services' recommendation, her treatment plan was twofold: to undergo outpatient counseling once a week and to seek a medication assessment. During Brandy's initial assessment, she admitted to Eigenberg that she had threatened her children with a knife and would slap them when she got angry. Eigenberg testified that later, Brandy would "kind of retract back and not want to admit it and the idea of getting into trouble if she admitted to things."

According to Eigenberg, Brandy attended only eight sessions, with her last appointment on May 14, 2010. Eigenberg testified that Brandy was not consistent in attending her counseling appointments and did not meet her treatment goals. Eigenberg also testified that she had concerns about Brandy's motivation to change and opined that she thought Brandy only wanted others to "feel like she's doing a good job rather than . . . really wanting to do the . . . good job to make those long changes."

On June 9, 2011, Brandy returned to Eigenberg, this time for department-mandated counseling following the removal of Nicole and Sandra from the home. Though Brandy initially attended counseling, she stopped fairly soon thereafter and her caseworker was informed of her noncompliance. After her caseworker was informed, Brandy attended her appointments consistently.

During this time, Brandy also underwent psychological testing. Brandy was diagnosed with a mood disorder, not otherwise specified, and additionally was found to have borderline intellectual functioning, such that "she may have difficulty understanding and following through on directives given to her." Brandy's testing indicated that "Brandy has sufficient mood variability of both depressive and hypomanic symptoms to be problematic, but not sufficient for a full diagnosis of bi-polar disorder." Tom Maxson, the therapist who conducted Brandy's testing, testified that Brandy's diagnosis was a "step-down diagnosis from a bipolar disorder." Maxson testified that for Brandy, medication was "essential."

Brandy's profile also suggested that

> she likely [is] indifferen[t] to the welfare of others and . . . may be exploitative . . . . Malicious tendencies seen in others may be used to justify her aggressive inclinations and may lead to frequent personal and family difficulties and occasional legal entanglements. . . . Brandy likely is envious of others and may feel that she is treated unfairly yielding to irritability and anger. She may obtain vindictive gratification from humiliating others. A guiding princip[le] for Brandy may be to outwit others, exploiting them before they exploit her. . . . If she is unsuccessful in channeling her suspicious and aggressive impulses, her resentment may mount into acts of potential abuse and hostility. Brandy is likely to display rapidly changing moods and have outbursts of bitter resentment and demanding irritability.

The report continues:

> The primary concern for Brandy, especially in relation to her children, is her personality patterns. Brandy appears to exhibit[] patterns of behavior that result in dangerous situations for her children. Brandy's dependent traits make her reliant on others to help her make decisions and her borderline traits make her prone to feeling abandoned and rejected. When she feels rejected and alone, she resorts to methods of controlling the situation around her to get her needs met. In the recent past it appears that in order to control the father of her children, Tom, she was [sic] resorted to threatening behavior or in her words "taking it out on" her daughters in order to hurt Tom for making her feel rejected. . . . Most likely, when Brandy feels rejected she feels the desire to make Tom hurt like she hurts, therefore, she "takes it out" on her children because this is the most effective way to make him hurt. . . . Most likely, when Brandy is very angry or feeling abandoned, in her mind her children become objects to get her needs met and not children to be nurtured and protected. . . . Her current medication has reduced some of this anger and depression, but without

> consistent accountability and supervision, her behavioral patterns will likely return . . . .

Eigenberg testified that Brandy attended her appointments and at first seemed motivated. But Eigenberg would later find that Brandy was "not honest," which interfered with her progress. In particular, Eigenberg testified that Brandy had trouble accepting responsibility for what had happened to the children. Eigenberg indicated that at first, Brandy was able to acknowledge some of her antisocial and sadistic thinking, but that later, Brandy became "guarded" and "much more focused on what she needed to show the team that she was . . . working hard or doing things . . . than really actually doing the work to make those changes."

Eigenberg testified to several examples of Brandy's lack of honesty. First, Eigenberg noted that Brandy consistently informed her and the team that she was taking her medications, when in fact she was not. In addition, Brandy was not truthful with Eigenberg concerning how often she was seeing her doctor regarding that medication. Eigenberg also testified that Brandy did not prioritize her need for medication, using her money to buy other items instead of paying for her medication.

Brandy also initially denied that she had encouraged Nicole to speak to Trantham about reinstating the unsupervised visitation and did not admit to Eigenberg that she had done so until Brandy was confronted with notes from the team meeting where this incident was documented. And Brandy would often inform Eigenberg that things were going well, only for Eigenberg to later learn from members of the team that this was not the case.

Eigenberg testified that during her second round of treatment with Brandy, Eigenberg felt that Brandy had not met her treatment goals, though she also testified that Brandy had made some progress. At this point, Brandy switched therapists.

After ceasing therapy with Eigenberg, Brandy began to see White. White testified that she had spoken with Eigenberg about Brandy and had unsuccessfully attempted to contact both Trantham and Brandy's psychiatrist. She testified that she had not contacted Tom's therapist.

White indicated that she spoke with Brandy about the importance of Brandy's being open and honest. According to White, as far as she knew, Brandy had been honest in their therapy relationship, had attended consistently, and was progressing.

On further examination, however, White acknowledged that while she was aware of Brandy's knowledge of the sexual assault perpetrated on the children, White was not aware Brandy had visited the perpetrator in jail on various occasions, and that she was aware of certain abuse allegations against Brandy only because either Eigenberg told her or they were documented. White also testified that as far as she knew, Brandy had been compliant with her medication. But White acknowledged that she was relying on Brandy's self-reporting for this belief.

White testified she felt that Brandy could, with assistance, raise her children, and should be given more time to proceed with the case plan.

In addition to testimony from Brandy's therapists, Tom testified that in the time just prior to trial, Brandy's medication compliance had improved. He testified that he was not actually observing Brandy take her medication. Tom testified that he felt Brandy was doing much better because of the medication. Other witnesses echoed the belief that Brandy had changed.

Brandy testified that she was taking her medication "[r]ight in front of" Tom so that he could observe her doing so. Brandy explicitly admitted both slapping and spanking the children, but testified that she would not do so again.

8. Tom's Counseling and Brandy and Tom's Couples' Counseling

Tom also underwent counseling. He was originally evaluated in November 2011 and was diagnosed with an adjustment disorder with a depressed mood, most likely due to the children's removal from the home. In addition, Tom's results indicate that his full-scale IQ is in the below-average/borderline range, which "would suggest that Tom will have some difficulty with understanding multistep directions and complicated instruction.

It will be important to double check that Tom has a clear understanding of what is expected of him prior to making the assumption that he understands."

Maxson, who also performed Tom's testing, testified that Tom's "day-to-day functioning was really quite adequate. He got up everyday, he'd go to work . . . . He made sure bills were paid, he came home. . . . [H]e was doing all the basic daily living skills." Maxson had no concerns about Tom's ability to function, but indicated that "it would be difficult for him to be on his own with his kids. . . . I would have some reservations and I would say that he would need a fair amount of support . . . ."

Tom's profile further indicates:

> Throughout Tom's first marriage and now his relationship with Brandy, he tends to be a "victim" of his mate's behaviors. He allowed his first wife to verbally and physically abuse him and then allowed Brandy to verbally abuse his daughters. Tom admits that he is frequently the target of the anger of others. Tom stayed in the situation because he questioned if he could raise the girls on his own, but also stayed because he has ongoing unresolved grief about his separation from and eventual death of his first wife. In addition to relationship concerns with his wife and now with Brandy, Tom continues to have an estranged relationship with his brother. . . . All of these broken relationships seem to indicate a concerning pattern of lack of interpersonal relationship skills. Though Tom's borderline intelligence score may account for some of his confidence concerns as well as impact his ability to quickly negotiate the intricacies of interpersonal relationships, it does not account for all of the concern. Tom's general view of himself, ability to set and maintain boundaries, and low self[-]confidence in his own abilities are a much larger concern.
>
> When considering the reunification process, there are many factors that must be considered. First and foremost is an assurance that the verbal abuse, threats and alleged physical abuse must be stopped. This will most likely come from the girls' self[-]report. Tom denies

> witnessing any physical abuse, but it is unclear what he would consider "physical abuse" and at what point he would actually intervene. Next, Tom needs to develop a clear safety plan as to what he will do if Brandy becomes verbally aggressive. This would include the immediate plan (getting the girls out of the situation), an intermediate plan (who to talk to and how to intervene) and a long term plan (if things don't change, what are the options). Tom needs to also develop the skills and abilities to gain confidence that he can be on his own and/or set appropriate boundaries so problematic behaviors are less likely to occur.

Maxson testified that unless Tom could make changes to his "victim behavior," Tom's pattern of behavior would continue and he would not be able to protect the children from Brandy.

Tom underwent counseling with Sarah Hock beginning in January 2012. In addition to individual therapy, Tom and Brandy also engaged in couples' therapy with Hock beginning in April 2012.

Hock testified that Tom's individual treatment goals were to work on formulating a plan for change: "taking accountability for his own roles in why the children were removed and identifying . . . a safety plan." Hock testified that she had some concerns about Tom's ability to be honest with her and to give truthful information for his treatment to work. Hock indicated that Tom would inform her that things were going well, but she would later learn from other members of the team that such was not necessarily the case. But Hock had no concerns about Tom's harming the children.

Hock testified that Tom was consistent in his attendance and that his motivation in regaining his children has remained the same. Hock also testified that while Tom had insight into what needed to be done, "the follow-through has not been there." Overall, Hock believed that Tom had made progress toward his treatment goals, but had not met them.

9. Case Plan Progression

Kelly Cheloha, the parties' most recent caseworker, testified that reunification was not recommended. And Christina

Ledesma, another caseworker, indicated that there had been minor and slow progression on the case plan for both Tom and Brandy.

According to Ledesma, in the beginning, Brandy would report that she was attending counseling, seeing her psychiatrist regarding medications, and taking those medications. In fact, she was often doing none of those things. Eventually, Brandy was able to attend counseling on a fairly consistent basis. But even though she was attending therapy, Ledesma testified that Brandy was not able to meet her therapy goals. This was echoed by Cheloha.

The initial reason for the children's removal was Tom and Brandy's dirty home. In the beginning, keeping it clean was an issue. By the time of trial, the unsanitary condition of the home was not much of an issue, though the kitchen was still occasionally a concern.

Brandy was also supposed to work on her parenting skills by learning and demonstrating rules, consequences, rewards, and routines for the children. Both Tom and Brandy completed several parenting courses, though not without some trouble retaining and repeating the information conveyed. Ledesma reported that there was some progress made on this front, though redirection was still common during Brandy's visits with the children.

Ledesma's primary concern was Brandy's lack of progression with her medication and therapy. Such progression would have helped to return Tom and Brandy to semisupervised visitation. But Ledesma also expressed concern because Nicole in particular was very afraid of any unsupervised time with Brandy. And, of course, Nicole's report of continued physical abuse contributed to Ledesma's opinion.

As for Tom, according to a family support worker, he was able to provide proper parenting upon occasion, but not consistently. Ledesma described Tom as "pretty laid back" and stated that it took him awhile to show that he could be consistent with rules and consequences. The family support worker testified that the children were very disrespectful to

Tom during visitation but that Tom was not able to recognize that behavior.

Tom was described as the "softer" parent, who would give in to the children when Brandy would not. This would occur even in situations where Brandy was attempting to redirect in compliance with the family support worker's advice.

Another family support worker testified to her concern about Tom and Brandy's communication. That worker testified that during the 9 months she had worked with the family, she could recall just one instance of Tom's standing up to Brandy, and that she did not believe Tom could protect the children from Brandy.

During Tom's testimony regarding his case progression, he stated that he believed he was making progress based upon what people were telling him and that often, he would go to team meetings and be surprised Brandy had created yet another "pitfall[] or downfall[]."

Ledesma and others expressed concern about Tom's ability to protect the children. Ledesma testified that her concern was that Tom had failed to protect the children. And Cheloha testified similarly that Tom had failed to protect the children from unsafe situations. Cheloha also noted that the children had interaction with inappropriate individuals and that the blame for that lay with both Tom and Brandy.

Cheloha also expressed concern that the children would act in ways that Tom would be unable to handle, including tantrums, fighting, trouble getting out of bed in the morning, and bed-wetting. Cheloha also referenced Tom's parenting history, specifically, prior "CFS cases" concerning his older daughter from a previous marriage.

In Tom's defense to these allegations, he explained that when Brandy was yelling at the children, he would remove them from the immediate situation. But because he knew he was Brandy's ultimate target, he assumed the children would be fine when he was out of the home. For this reason, Tom indicated he was not concerned about leaving the children alone with Brandy.

But ultimately, all the evidence at trial tended to show that the children loved Tom. No one expressed any concern about the children's safety around Tom. The testimony was that if Tom would work on his parenting and would not be so "soft," then Tom "could be a good dad."

10. Continued Viability of Tom and Brandy's Relationship

A continuing theme throughout the record was whether Tom would be willing to leave Brandy. And in the beginning, it was clear that Tom wanted to stay with Brandy. Maxson testified that during Tom's psychological testing, Tom indicated he was not going to leave Brandy because he felt that without him, "she would fall apart." Other testimony also indicated that Tom did not want to leave Brandy, because he felt that she had made some changes and things were going well.

By April 2012, Tom admitted in therapy that he and his attorney had discussed Tom's leaving Brandy if it meant he could get the children back, though he did not want to do this because he thought Brandy had made a lot of changes. But in August, Tom and Brandy indicated in a couple's session that they had discussed relinquishing their parental rights to the children, though they expressed that this was not something they wanted to do.

In October 2012, around the time that Tom was at perhaps the height of his frustration with Brandy, he indicated that he had considered leaving Brandy and filing for sole custody. But Tom told Hock, with whom Tom and Brandy received couples' counseling, that Brandy did not understand Tom meant it when he said that he was leaving and wanted the children and that there would be no way for her to "'sneak around'" to see them whenever she wanted. By the time the State filed for termination in January 2013, Tom and Brandy were considering having Brandy move out so that Tom could gain custody of the children.

At the hearing, Tom was reminded of various conversations he had had at team meetings in which the State suggested that if Tom were to move out, visitation between Tom and the children could be arranged. Tom testified that at the time, he was

resistant to that idea, because he did not want to take Brandy away from the children.

When Tom first testified at the hearing, he indicated that he and Brandy planned to stay together. But Tom later testified that he could raise the children by himself, though he knew he would need family support to do so. Tom testified that he was in a better position to be a good parent and to stand up to Brandy because of the counseling and guidance received over the last few years.

And when asked, if he were given the choice between having the children home and having Brandy continue to live in the home, he indicated he would choose having the children home.

11. Procedural History

As is noted above, the children were removed from the home on March 28, 2011, and a petition to adjudicate was filed the next day. The children were adjudicated on April 6. Seven review hearings were held approximately every 3 months over the next 22 months. Tom and Brandy were represented by counsel, who appeared at each of those hearings, including the adjudication. Tom and Brandy were present at the adjudication and all but two of the review hearings. For a short time at the beginning of the process, Brandy was appointed a guardian ad litem, who attended two review hearings. In addition, the children's guardian ad litem was present at all review hearings.

The Department of Health and Human Services' case plans regarding the family were offered at these review hearings. The first case plan dealt with the original reason for removal, i.e., the unsanitary home condition. By the second case plan, filed on August 8, 2011, and approved at an August 10 hearing, reports of prior abuse suffered by the children had surfaced. And the November 7 case plan, prepared for the November 9 review hearing, contained further allegations of abuse occurring during Tom and Brandy's visitation with the children. All subsequent case plans focused on the original reason for adjudication—the unsanitary home condition—as well as Tom and Brandy's parenting skills and the abuse allegations.

On January 16, 2013, the State filed to terminate Tom's and Brandy's parental rights. On January 24, Brandy's guardian ad litem was reappointed. Trial was scheduled for March 14.

Following a 5-day trial, the county court entered an order terminating Tom's and Brandy's parental rights. The county court concluded that the State had proved by clear and convincing evidence that Brandy was unable to discharge her parental responsibilities due to mental illness or deficiency under Neb. Rev. Stat. § 43-292(5) (Cum. Supp. 2012).

The court also concluded that the State had proved by clear and convincing evidence that Tom and Brandy had substantially and continuously or repeatedly neglected and refused to give Nicole and Sandra necessary parental care and protection under § 43-292(2), that Nicole and Sandra had been in out-of-home placement for 15 of the most recent 22 months under § 43-292(7), and that reasonable efforts to preserve and reunify the family had failed under § 43-292(6). However, the court found insufficient evidence to support a finding that termination was proper under § 43-292(9), subjecting the child to aggravated circumstances based upon the sexual abuse, and dismissed that ground. The court further concluded that it was in the best interests of Nicole and Sandra that Tom's and Brandy's parental rights be terminated. The county court did not make any specific finding as to Tom's or Brandy's parental fitness.

III. ASSIGNMENTS OF ERROR

On appeal, Brandy assigns that the county court erred in (1) finding that the State proved by clear and convincing evidence grounds for termination under § 43-292(2), (5), (6), and (7); (2) finding that reasonable efforts to reunify the family had failed; (3) finding that the children had been in out-of-home placement for 15 of 22 months; (4) not finding that Brandy had rehabilitated herself to a minimum level of fitness; and (5) finding that termination of Brandy's rights was in Nicole's and Sandra's best interests. Additionally, Brandy argues that the county court's findings were contrary to the evidence and that minimum due process standards were not met.

On cross-appeal, Tom assigns, renumbered, that the county court erred in (1) finding that the State had proved grounds for termination by clear and convincing evidence and (2) finding that termination was in the children's best interests. Tom also assigns that the procedures utilized by the county court, in particular, the failure to apply the Nebraska Evidence Rules with respect to hearsay, did not meet minimum due process standards.

IV. STANDARD OF REVIEW

[1] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.[1] When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.[2]

V. ANALYSIS

Brandy assigns as error several findings of the juvenile court. In her brief, she explains that her assignments fall into three categories: that the juvenile court (1) failed to "meet established due process guidelines"; (2) failed to provide her time to "eliminate or ameliorate identified mental deficiencies" once they had been noted in the case plan and court reports, namely the fact that family therapy was not conducted; and (3) erred in finding the State had proved by clear and convincing evidence that the termination of her parental rights was in the children's best interests.[3] However, Brandy argues only that family therapy should have been attempted and that she should be given more time to rehabilitate herself before her parental rights are terminated.

Tom also assigns several errors to the juvenile court, but the crux of his argument on appeal is twofold: (1) The juvenile court erred in finding the State proved by clear and convincing evidence that there were grounds to terminate his parental

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[1] *In re Interest of Kendra M. et al.*, 283 Neb. 1014, 814 N.W.2d 747 (2012).

[2] *Id.*

[3] Brief for appellant at 8.

rights and that such termination was in the children's best interests, and (2) his due process rights were violated when Nicole's hearsay statements were admitted into evidence.

[2,3] Under § 43-292, in order to terminate parental rights, the State must prove, by clear and convincing evidence, that one or more of the statutory grounds listed in the section have been satisfied and that termination is in the child's best interests.[4] The proper starting point for legal analysis when the State involves itself in family relations is always the fundamental constitutional rights of a parent.[5]

[4-8] A parent's right to raise his or her child is constitutionally protected; as such, before a court may terminate parental rights, the State must also show that the parent is unfit.[6] There is a rebuttable presumption that the best interests of a child are served by having a relationship with his or her parent. Based on the idea that fit parents act in the best interests of their children, this presumption is overcome only when the State has proved that a parent is unfit.[7] The term "unfitness" is not expressly used in § 43-292, but the concept is generally encompassed by the fault and neglect subsections of that statute, and also through a determination of the children's best interests.[8] In discussing the constitutionally protected relationship between a parent and a child, we have stated that "'"[p]arental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which caused, or probably will result in, detriment to a child's well-being."'"[9] The best interests analysis and the parental fitness

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[4] *In re Interest of Angelica L. & Daniel L.*, 277 Neb. 984, 767 N.W.2d 74 (2009).

[5] *Id.*

[6] *In re Interest of Kendra M. et al.*, *supra* note 1.

[7] *Id.*

[8] *Id.*

[9] *Id.* at 1033-34, 814 N.W.2d at 761.

analysis are fact-intensive inquiries. And while both are separate inquiries, each examines essentially the same underlying facts as the other.[10]

[9,10] The fact that a child has been placed outside the home for 15 or more of the most recent 22 months does not demonstrate parental unfitness.[11] Instead, the placement of a child outside the home for 15 or more of the most recent 22 months under § 43-292(7) merely provides a guideline for what would be a reasonable time for parents to rehabilitate themselves to a minimum degree of fitness. Regardless of the length of time a child is placed outside the home, it is always the State's burden to prove by clear and convincing evidence that the parent is unfit and that the child's best interests are served by his or her continued removal from parental custody.[12]

1. Termination of Brandy's Parental Rights

[11] On appeal, Brandy assigns multiple assignments of error. But in her brief, Brandy argues only that the county court erred in terminating her parental rights, and more particularly argues that she should be permitted to participate in family therapy with the children. Because Brandy does not argue her other assignments of error, we decline to address them. To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.[13]

In order to terminate Brandy's parental rights, the State must rebut the presumption that Brandy is a fit parent and that it is in the best interests of her children for her rights to remain intact. The State must also show statutory grounds to support the termination.

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[10] *Id.*

[11] *Id.*; *In re Interest of Angelica L. & Daniel L.*, *supra* note 4; *In re Interest of Xavier H.*, 274 Neb. 331, 740 N.W.2d 13 (2007).

[12] *In re Interest of Angelica L. & Daniel L.*, *supra* note 4.

[13] *Wulf v. Kunnath*, 285 Neb. 472, 827 N.W.2d 248 (2013).

(a) Parental Unfitness

We begin by addressing the county court's implicit finding that Brandy was unfit, and we conclude that the State has met its burden of showing that Brandy is unfit. "'"Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which caused, or probably will result in, detriment to a child's well-being."'"[14]

The circumstances surrounding Brandy's mental illness suggest that Brandy is unfit. Her psychological profile, as set out above in detail, is concerning. The State presented evidence that Brandy suffers from "sufficient mood variability of both depressive and hypomanic symptoms to be problematic," a "step-down diagnosis from a bipolar disorder."

According to Maxson, the therapist who conducted Brandy's testing, medication was "essential." Maxson also noted that while Brandy's "current medication has reduced some of [Brandy's] anger and depression . . . without consistent accountability and supervision, her behavioral patterns will likely return." But the State produced significant evidence that Brandy was often not medication compliant and would lie about that fact. And Brandy's profile indicates that she is likely to revert to her prior ways without consistent accountability and supervision.

In addition, Brandy has repeatedly verbally and physically abused the children, both before and since they were removed from the family home. The verbal abuse included threats to the children that Brandy would stab them while they slept. These threats were so intense that, over 2 years later and after therapy, Nicole still fears being left alone with Brandy. Nicole has repeatedly indicated that she does not believe Brandy's abuse will stop, and Nicole fears that Brandy will enter her bedroom at the foster home while she sleeps. Meanwhile, Brandy denies that much of this abuse occurred.

Moreover, both children were sexually abused by a friend of Brandy's. While there is nothing to suggest that Brandy

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[14] *In re Interest of Kendra M. et al., supra* note 1, 283 Neb. at 1033, 814 N.W.2d at 761.

was aware of the abuse at the time it occurred, when Brandy did learn of it, she did not sufficiently report the abuse to law enforcement and, for a time at least, had some contact with the perpetrator.

That the children have suffered psychologically at Brandy's hands seems clear. Both children have been diagnosed with an adjustment disorder. Nicole has additionally been diagnosed with posttraumatic stress disorder, and Trantham, the children's therapist, believes that Sandra might also have reactive attachment disorder. On at least one occasion, Brandy interfered with Nicole's therapy by asking Nicole to request a resumption of semisupervised visits. Brandy initially denied doing this. Immediately following this interference, Nicole began suffering from dissociation, trouble sleeping, auditory hallucinations, and impaired concentration.

Other evidence showed that Brandy often put the needs of others ahead of the needs of her children and ignored them during visitation in favor of spending time with other relatives. And evidence was presented that Brandy had failed to meet any of her therapy goals.

The family's caseworkers testified that Brandy had made minor progression on her case plan. Brandy had shown some progress on her parenting skills, and the unsanitary home condition that had precipitated the children's adjudication was largely resolved. In addition, Brandy had, eventually, consistently attended, though perhaps not fully participated in, her therapy appointments, and additionally attended some couples' sessions with Tom. She also appears to currently be taking her medication.

While in the short term Brandy might be stable, she has spent a long time being unstable. Brandy's history is suggestive. Given that history, Brandy cannot be trusted to maintain this stability. This court can consider this history when determining whether to terminate parental rights.[15] And certainly, the children should not be made to wait and see if Brandy can remain healthy for them. We have said that "[c]hildren cannot,

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[15] *In re Interest of Kendra M. et al., supra* note 1.

and should not, be suspended in foster care or be made to await uncertain parental maturity."[16]

We conclude that the State has met its burden of rebutting the presumption that Brandy was a fit parent.

(b) Best Interests

We turn next to the question of whether it is in the children's best interests that Brandy's parental rights be terminated. While a separate inquiry from the determination as to Brandy's fitness, both are fact intensive and examine essentially the same underlying facts as the other. This presumption is only overcome when a parent has been proved unfit.[17]

As noted above, while in Brandy's care, the children were subject to physical and verbal abuse such that Nicole is still afraid to be alone with Brandy. By and large, Brandy denies that this abuse occurred. Yet, Ledesma, one of the children's caseworkers, testified that the children told her that they felt unsafe when at home with Brandy.

Moreover, both children have been diagnosed with an adjustment disorder. Nicole has also been diagnosed with posttraumatic stress disorder, and Sandra might have reactive attachment disorder. Nicole is often anxious, and Sandra has trust issues with adults. We also note the sexual assault of the children and Brandy's failure to report it in a timely manner.

The children have been successful in the foster home. They are both doing well in school, with few behavior issues. They are involved in extracurricular and church activities. Their foster parents are willing and able to adopt them.

Trantham testified that it was in the children's best interests that Brandy's parental rights be terminated and further testified that reunification was not possible. We agree, and conclude that the State has met its burden to show that termination of Brandy's parental rights is in Nicole's and Sandra's best interests.

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[16] *In re Interest of Walter W.*, 274 Neb. 859, 872, 744 N.W.2d 55, 65 (2008).

[17] See *In re Interest of Angelica L. & Daniel L.*, *supra* note 4.

(c) Statutory Basis

Finally, we turn to the question of whether the State showed sufficient statutory grounds to support the termination of Brandy's parental rights. The county court concluded that the State had proved sufficient grounds under § 43-292(2), (5), (6), and (7). We agree.

Much of the evidence supporting these grounds is set forth above. Section 43-292(2) provides for termination in cases where the parents have "substantially and continuously or repeatedly neglected or refused to give . . . necessary parental care and protection." And in this case, § 43-292(2) was met, because, as is described in more detail above, Brandy verbally and physically abused the children.

Section 43-292(5) provides for termination when the parents are "unable to discharge parental responsibilities because of mental illness . . . and there are reasonable grounds to believe that such condition will continue for a prolonged indeterminate period." We conclude that the State has proved this statutory ground with the evidence of Brandy's mental illness diagnosis and her failure to consistently take her medication despite the fact that it was deemed "essential."

We also note that the children have been out of the home since March 28, 2011. The State filed for termination on January 16, 2013. At that time, the children had been in out-of-home placement for over 21 months. Thus, there is sufficient evidence in the record to show that the children were in out-of-home placement for 15 of the most recent 22 months under § 43-292(7).

We note that Brandy argues family therapy ought to have been attempted. But Trantham and Eigenberg both testified that family therapy was not indicated because the children were not ready. At some point, the children might have been ready for family therapy. But many of the reasons for the failure to undergo such therapy can be pinned on Brandy's failure to take responsibility for the abuse of the children. We find Brandy's argument regarding family therapy without merit.

The State offered sufficient evidence to support the above statutory grounds for termination. Because there were statutory grounds and because the State rebutted the presumption that Brandy was a fit parent and that it was in the children's best interests for Brandy's rights to remain intact, the decision of the county court terminating Brandy's parental rights is affirmed.

2. Tom's Parental Rights

As with Brandy, in order to terminate Tom's parental rights, the State must rebut the presumptions that Tom is a fit parent and that it is in the best interests of his children for his rights to remain intact. The State must also show that a statutory basis for the removal is present.

As we did when considering Brandy's rights, we begin with parental fitness. As we note above, the State bears the burden of rebutting the presumption that Tom is a fit parent. We conclude that the county court erred in its implicit finding that Tom was unfit and accordingly reverse the county court's termination of Tom's parental rights.

The State presented evidence that Tom failed to protect the children from Brandy. In particular, the State contends that because Tom did not leave Brandy, call a child abuse hotline, contact law enforcement, or even make sure that a trustworthy person was around to watch the children in his absence, he is unfit.

It is undisputed that Tom did not call law enforcement or the abuse hotline. But it is disingenuous to conclude that Tom did not protect the children from Brandy. Tom would remove them from Brandy's presence when she would engage in verbal abuse directed at the children. He insists that he never witnessed any physical abuse. And he testified that he was not concerned about abuse when he was not home, because he believed that Brandy was taking her anger at him out on the children, to make him hurt, and that if he was not present, the trigger was not there. Such a conclusion is not inconsistent with Brandy's psychological profile, which suggested that Brandy's actions toward the children were done at least in part as a way to antagonize Tom.

It is true that Tom continued to reside with Brandy both before and after the children were removed from the home. And Tom declined the opportunity to pursue visitation with the children if he would move out or have Brandy move out. But Tom's case plan never provided that he needed to leave Brandy. Until the State filed for termination, the primary case plan for the family was reunification, though eventually adoption was listed as a secondary plan. Throughout this process, Tom underwent couples' therapy and joint visitation with Brandy, while his own counseling saw him work on a safety plan due to Brandy's instability.

We further note that Tom's psychological profile provides that "Tom will have some difficulty understanding multi-step directions and complicated instruction. It will be important to double check that Tom has a clear understanding of what is expected of him prior to making the assumption that he understands."

Tom suffers from an adjustment order, apparently due to the removal of his children from the home. His intelligence is borderline/below average. His profile indicates that he is a "victim." His parenting skills are inconsistent, and he is described as "weak" and "soft." Tom appears to be overly optimistic about Brandy's ability to change, to the extent that he denies her bad behavior unless directly presented with it.

But still, Tom functions on a day-to-day basis. He has a job and pays the bills. He loves the children, and they love him. Aside from one allegation from Nicole, barely addressed in the record, that Tom once pulled her hair, there are no concerns by anyone that Tom would physically harm the children. Tom now indicates that he is willing to leave Brandy so that he can parent the children on his own, and the evidence presented in the record suggests that, with help, he is capable of doing so.

Tom is not a perfect parent. But as we have often emphasized, perfection of a parent is not required. We conclude that the State did not rebut the presumption that Tom is a fit parent. As such, the county court erred in terminating Tom's parental rights. We need not address whether the State rebutted the presumption that termination was in the children's best interests

or whether statutory grounds for termination were shown. And because we conclude that termination of Tom's parental rights was in error, we decline to address Tom's arguments that Nicole's statements were inadmissible hearsay. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.[18]

VI. CONCLUSION

We affirm the county court's order terminating Brandy's parental rights. But because the State did not rebut the presumption that Tom was a fit parent, the county court's order terminating Tom's parental rights is reversed.

AFFIRMED IN PART, AND IN PART REVERSED.

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[18] *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005).

BRENDA R. RICE, APPELLANT, V. CHRISTINA WEBB, PERSONAL REPRESENTATIVE OF THE ESTATE OF DALE E. RICE, DECEASED, APPELLEE.

844 N.W.2d 290

Filed March 21, 2014. No. S-13-458.

1. **Divorce: Judgments: Appeal and Error.** The meaning of a divorce decree presents a question of law, in connection with which an appellate court reaches a conclusion independent of the determination reached by the court below.
2. **Judgments: Divorce: Property Settlement Agreements.** A dissolution decree which approves and incorporates into the decree the parties' property settlement agreement is a judgment of the court itself.
3. **Courts: Jurisdiction: Divorce: Property Settlement Agreements.** A district court, in the exercise of its broad jurisdiction over marriage dissolutions, retains jurisdiction to enforce all terms of approved property settlement agreements.
4. **Courts: Jurisdiction.** A court that has jurisdiction to make a decision also has the power to enforce it by making such orders as are necessary to carry its judgment or decree into effect.
5. **Divorce: Insurance.** The general rule is that divorce does not affect a beneficiary designation in a life insurance policy.
6. **Divorce: Property Settlement Agreements: Intent.** If the dissolution decree and any property settlement agreement incorporated therein manifest the parties' intent to relinquish all property rights, then such agreement should be given that effect.

7. **Contracts.** Ambiguity exists in a document when a word, phrase, or provision therein has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
8. **Divorce: Intent.** If the contents of a dissolution decree are unambiguous, the decree is not subject to interpretation and construction, and the intention of the parties must be determined from the contents of the decree.
9. **Divorce.** If the contents of a dissolution decree are unambiguous, the effect of the decree must be declared in the light of the literal meaning of the language used.
10. **Divorce: Modification of Decree: Property Settlement Agreements.** Where parties to a divorce action voluntarily execute a property settlement agreement which is approved by the dissolution court and incorporated into a divorce decree from which no appeal is taken, its provisions will not thereafter be vacated or modified in the absence of fraud or gross inequity.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., L.L.O., for appellant.

James A. Cada, of Cada, Cada, Hoffman & Jewson, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

Brenda R. Rice and Dale E. Rice were married in September 2001. In May 2011, Brenda filed for divorce. Brenda and Dale entered into a property settlement agreement, and on August 8, 2011, the district court for Lancaster County filed a decree dissolving their marriage and incorporating the property settlement agreement. Dale died shortly thereafter on August 15. At the time of his death, Dale owned two life insurance policies and Brenda was still listed as the primary beneficiary on both policies. After Brenda filed claims for the proceeds of the life insurance policies, the personal representative of Dale's estate filed a motion to enforce the decree, arguing that under the property settlement agreement, Brenda no longer had any legal claim to the policies. Following the receipt of evidence, the district court filed its "Judgment of Enforcement of Decree" on April 23, 2013, in which it ordered Brenda to withdraw her

claims under Dale's life insurance policies. Brenda appeals. We conclude that by the four corners of the property settlement agreement, which was incorporated into the divorce decree, Brenda clearly and unambiguously relinquished her beneficiary interests in Dale's life insurance policies, and we therefore affirm.

STATEMENT OF FACTS

Brenda and Dale were married in September 2001. No children were born of their marriage, but both Brenda and Dale had children from prior marriages. Brenda filed for divorce in May 2011. On August 6, Brenda and Dale signed a property settlement agreement. On August 8, the district court entered a decree dissolving the marriage, which incorporated the property settlement agreement. Relevant portions of the property settlement agreement are quoted below. Paragraph VI of the property settlement agreement provided:

> **VI. STOCKS, BANK ACCOUNTS, LIFE INSURANCE POLICICES** [sic]**, PENSION PLANS AND RETIREMENT PLANS**
>
> [Brenda] shall be awarded all interest in all pension plans, stocks, retirement accounts, 401(k), IRA, life insurance policy and checking or savings account in [Brenda's] name, free from any claim of [Dale] including all ownership interest in the LincOne Federal Credit Union joint account. [Dale] shall be awarded all interest in any pension plans, stocks, retirement accounts, 401(k), IRA, life insurance policy and checking or savings account in [Dale's] name, free from any claim of [Brenda]. The parties shall divide evenly the sums in the LincOne Credit Union accounts.

Paragraph IX of the property settlement agreement provided:

> **IX. PROPERTY PROVISIONS AND SETTLEMENT OF PROPERTY RIGHTS OF PARTIES**
>
> It is expressly understood by and between the parties hereto that the provisions of this agreement relating to the property and liabilities of each, set aside and allocate to each party his or her respective portions of the properties belonging to the parties and of the liabilities of the

> parties at the date hereto; and each party acknowledges that the properties set aside to him or her, less the liabilities so allocated to him or her, will be in full, complete and final settlement, release and discharge, as between themselves, of all rights, claims, interests and obligations of each party in and to the said properties and the same in their entirety constitute a full, fair and equitable division and the partition of their respective rights, claims and interests in and to the said properties of every kind and nature.

Paragraph X of the property settlement agreement was labeled "**WAIVER AND RELEASE OF MARITAL RIGHTS**." Subsections (a) and (b) of paragraph X contain almost identical language, except that subsection (a) refers to Dale and subsection (b) refers to Brenda. Paragraph X provided in part:

> Pursuant to *Neb. Rev. Stat.* Section 30-2316, the parties hereby agree as follows:
>
> (a) In consideration of the provisions of this agreement, [Dale] waives and relinquishes any and all interest or rights of any kind, character, or nature whatsoever, including but not limited to all rights to elective share, homestead allowance, exempt property, and family allowance in the property of [Brenda], and renounces all benefits which would otherwise pass to [Dale] from [Brenda] by intestate succession or by virtue of the provisions of any Will executed before this Settlement Agreement which he, as husband, or as widower, or otherwise, has had, now has, or might hereafter have against [Brenda], or, in the event of her death, as an heir at law, surviving spouse, or otherwise. [Dale] also waives and relinquishes any and all interest, present and future, in any and all property, real, personal, or otherwise, now owned by [Brenda] or hereafter acquired, and including all property set aside for her in this agreement, it being the intention of the parties that this agreement shall be a full, final, and complete settlement of all matters in dispute between the parties hereto.
>
> (b) In consideration of the provisions of this agreement, [Brenda] waives and relinquishes any and all

> interest or rights of any kind, character, or nature whatsoever, including but not limited to all rights to elective share, homestead allowance, exempt property, and family allowance in the property of [Dale], and renounces all benefits which would otherwise pass to [Brenda] from [Dale] by intestate succession or by virtue of the provisions of any Will executed before this Settlement Agreement which she, as wife, or as widow, or otherwise, has had, now has, or might hereafter have against [Dale], or, in the event of his death, as an heir at law, surviving spouse, or otherwise. [Brenda] also waives and relinquishes any and all interest, present and future, in any and all property, real, personal, or otherwise, now owned by [Dale] or hereafter acquired, and including all property set aside for him in this agreement, it being the intention of the parties that this agreement shall be a full, final, and complete settlement of all matters in dispute between the parties hereto.

At the time of Dale's death, he owned two separate life insurance policies, one with Primerica and one with Unum. Both life insurance policies were awarded to Dale in the property settlement agreement. Brenda was still listed as the primary beneficiary for both policies when Dale died. Subsequent to Dale's death, Brenda made claims for the proceeds of the life insurance policies.

On September 1, 2011, the personal representative of Dale's estate filed a motion entitled "Motion to Enforce Divorce Decree," which stated that Brenda had waived her status as the beneficiary to Dale's life insurance policies. The motion also stated that by the property settlement agreement, Brenda had waived all rights and claims that she had to Dale's pension plan, stocks, retirement accounts, 401K, IRA, life insurance policies, and checking or saving accounts held by Dale.

On October 3, 2011, the district court filed an order granting the motion to enforce the divorce decree. The district court's order was vacated by the Nebraska Court of Appeals on July 30, 2012, in case No. A-11-938. The order was vacated, because the dissolution proceedings had not been

revived by Dale's estate and therefore the district court did not have jurisdiction.

Following the mandate, on October 1, 2012, the personal representative of Dale's estate filed a "Verified Motion for Revivor" pursuant to Neb. Rev. Stat. § 25-1403 (Reissue 2008). The district court sustained this motion by order filed January 4, 2013.

Brenda filed a motion entitled "Motion to Modify/Reform Property Settlement Agreement" on March 8, 2013. In her motion, Brenda asserted that as part of their dissolution proceedings, Brenda and Dale intended to keep each other as beneficiaries on the other's life insurance policies and that nothing in the property settlement agreement was intended to change that intention. Brenda sought to offer evidence to substantiate her contention. Brenda requested an order from the court determining that the property settlement agreement did not change the parties' status as beneficiaries of each other's life insurance policies or, in the alternative, an order modifying or reforming the property settlement agreement to reflect that intention.

The district court conducted an evidentiary hearing on the motion to enforce the divorce decree and the motion to modify or reform the property settlement agreement on April 10, 2013. Prior thereto, the district court entered a pretrial conference order on March 21. In the pretrial conference order, the parties described several legal issues presented by the case, including whether the district court had authority to enforce the decree and whether the property settlement agreement was ambiguous.

The parties stipulated to the following facts:

> 1. That on August 8, 2011, the Court entered a Decree and approved the Property Settlement Agreement entered into by Brenda . . . and Dale . . . and signed by them on the date indicated.
>
> 2. That Dale . . . died on August 15, 2011.
>
> 3. That Christina Webb was appointed Personal Representative of the Estate of Dale . . . pursuant to **Neb.Rev.Stat.** § 25-1403 *et seq*.

4. That this Court has jurisdiction over the subject matter and parties.

5. That Christina Webb is the Personal Representative of the Estate of Dale . . . and as an heir and oldest child, appears on behalf of the heirs of Dale . . . .

6. That at the time of his death, Dale was the owner of certain life insurance policies with Primerica and Unum which policies were awarded to [Dale] in the Property Settlement Agreement.

7. That at the time of his death Brenda was listed as the primary beneficiary of the Primerica and Unum life insurance polic[ies].

8. That at the time of his death, Dale was the owner of a LincOne account.

9. That at the time of his death, . . . Brenda was the joint owner of the . . . LincOne account.

10. That at the time of his death, Dale was the owner of a 401(k) retirement account with Vanguard which account was awarded to him in the Property Settlement Agreement.

11. That at the time of his death, Brenda was listed as the primary beneficiary of the Vanguard retirement account.

12. That Brenda directly relinquished her survivor claim to the Vanguard retirement account which was then awarded to her son who was the contingent/alternate beneficiary.

13. That upon his death, Brenda made application to receive the proceeds of the Primerica life insurance policy.

14. That by agreement of the parties, the proceeds from the death benefit of the Primerica policy are being held in escrow pending resolution of [this] case.

At the hearing, Dale's estate offered exhibits 15 and 16, which the district court received without objection. Exhibit 15 is a stipulation of facts as to what the attorney representing Brenda during the divorce proceedings, Terrance A. Poppe, would testify to if he were called. Exhibit 15 states:

1) That . . . Poppe . . . is an attorney, licensed to practice law in the State of Nebraska[.]

2) That Poppe was counsel to Brenda . . . in the divorce proceeding styled and captioned *Brenda Rice v. Dale Rice* in the District Cou[rt] of Lancaster County, Nebraska, CI 11-2081.

3) That . . . Dale . . . was not represented by counsel in that proceeding.

4) That all dealings that Poppe had concerning the agreement of the parties with respect to their property settlement agreement were with his client Brenda . . . .

5) That Poppe had no conversations, discussions or other communications with Dale . . . concerning the terms of the parties[’] property settlement agreement, prior to the drafting and execution of the agreement.

6) That at no time during the discussions leading up to the preparation and execution of the property settlement agreement that Poppe prepared, was Poppe informed by Brenda that the parties had an agreement that they would retain their status as beneficiary of the other’s life insurance and other accounts.

7) To the best of Poppe’s recollection, the issue of the parties’ beneficiary status was not discussed.

8) That at no time did Poppe discuss with Brenda . . . that the provisions of the property settlement agreement, as drafted, could affect the parties’ status as beneficiary of the other’s life insurance policy or accounts.

9) That attached hereto and marked Exhibit A is a true and correct copy of . . . Poppe’s billing records showing the dates of conferences and meetings with Brenda . . . .

Exhibit 16 was also a stipulation of facts, in which the parties stipulated that “in addition to an agree facts [sic] set forth in the Pretrial Order, the following facts are true and may be relied upon by the Court in its disposition of this matter.” The stipulation of facts in exhibit 16 states in relevant part:

Dale’s Primerica Life Insurance Policy

11. Prior to his marriage to Brenda, Dale was the owner of a term life insurance policy with Primerica with a death benefit of $250,000.00.

12. When the original policy was issued in 1992, his former wife Peggy was the primary beneficiary

and his "children of the marriage" were the contingent beneficiaries.

13. On or about January 3, 1997, after his divorce from Peggy, Dale identified his primary beneficiaries as Christina Rice, David E. Rice and Cynthia Rice [Dale's three children].

14. On or about January 17, 1997 Dale identified his contingent beneficiary as Loren Huddle [Dale's mother].

15. That on or about January 26, 2001, before his marriage to Brenda, Dale identified Brenda as his primary beneficiary and [Dale's three children] as his contingent beneficiaries.

16. Dale did not further change the beneficiary designation of the Primerica policy prior to his death.

17. At the time of the divorce, Dale still owned the Primerica policy.

18. Although not specifically mention[ed] in the property settlement agreement, it was the intention of the parties that Dale was awarded his Primerica policy.

19. At the time of his death, Brenda was still listed as the primary beneficiary and [Dale's three children] as the contingent beneficiaries.

20. After his death, Brenda made application for the death benefit as the primary beneficiary.

Dale's Unum Life Insurance Policy

21. At the time of the divorce Dale owned a term life insurance policy with Unum Insurance with a death benefit of $50,000.00.

22. At the time of the divorce Brenda was the primary beneficiary of the Unum policy and John Kelch [Brenda's son] was the contingent beneficiary.

23. Although not specifically mention[ed] in the property settlement agreement, it was the intention of the parties that Dale was awarded the Unum policy.

24. At the time of his death Brenda remained the primary beneficiary of the Unum policy and [Brenda's son] was the contingent beneficiary.

Brenda testified at the hearing, primarily regarding conversations she and Dale had had regarding their statuses as

beneficiary of the other's life insurance policies. The attorney representing Dale's estate objected "based on hearsay, not the best evidence, no probative value, and in violation of the parole [sic] evidence rule." The district court granted a standing objection. Brenda offered exhibit 17, a transcript of telephone voice messages between Brenda and Dale, and exhibit 18, a transcript of text messages between Brenda and Dale. The attorney representing Dale's estate reiterated the standing objection, and the district court received exhibits 17 and 18 and took the objections under advisement.

The district court filed its "Judgment of Enforcement of Decree" on April 23, 2013, in which it agreed with the personal representative of Dale's estate that Brenda had relinquished her beneficiary interest in Dale's life insurance policies, and it rejected Brenda's contentions to the contrary. The district court relied on *Pinkard v. Confederation Life Ins. Co.*, 264 Neb. 312, 647 N.W.2d 85 (2002), and concluded that the property settlement agreement was clear and unambiguous. The court determined that under the property settlement agreement, Brenda and Dale intended to relinquish their beneficiary and ownership interests in each other's life insurance policies and retirement accounts. The court rejected Brenda's arguments that the property settlement agreement was ambiguous, that parol evidence could be employed to determine Brenda's and Dale's intent on this issue, and that the property settlement agreement should be reformed. The court ordered Brenda to withdraw her claims under Dale's life insurance policies and to renounce her rights to any property or interest in Dale's estate and proceeds from any insurance policies on Dale's life.

Brenda appeals.

ASSIGNMENTS OF ERROR

Brenda generally assigns, restated, that the district court erred when it (1) determined that the terms of the property settlement agreement were unambiguous and that by its terms, Brenda waived her status as the designated beneficiary of Dale's life insurance policies; (2) failed to award her the proceeds of Dale's life insurance policies; and (3) granted the motion

of Dale's estate to enforce the decree by removing her as the designated beneficiary of Dale's life insurance policies.

STANDARD OF REVIEW

[1] The meaning of a divorce decree presents a question of law, in connection with which we reach a conclusion independent of the determination reached by the court below. *Hohertz v. Estate of Hohertz*, 19 Neb. App. 110, 802 N.W.2d 141 (2011).

ANALYSIS

At issue in this appeal is the meaning of the portions of the decree for dissolution which touch on the disposition of two life insurance policies on Dale's life. The district court determined that under the decree, which incorporated the parties' property settlement agreement, Brenda had relinquished, renounced, and waived any right, title, or interest in and to any property interest in the proceeds from any insurance policies on Dale's life. To enforce the decree, Brenda was ordered to withdraw her claims made against the Dale's estate and to the life insurance policies.

Dale's estate contends that the property settlement agreement is clear and unambiguous and that, by the language of the property settlement agreement, Brenda relinquished her beneficiary interests in Dale's life insurance policies as the district court determined. In contrast, Brenda contends that the district court erred. Brenda first asserts that she did not relinquish her beneficiary interests in Dale's life insurance policies under the terms of the property settlement agreement. Second, Brenda asserts that the property settlement agreement is ambiguous and that parol evidence would show that Brenda and Dale intended that they each remain the designated beneficiary on each other's life insurance policies. Third, Brenda asserts that if it is determined that the property settlement agreement is unambiguous, it should nevertheless be reformed to reflect such intent. We find no merit to Brenda's arguments, and we affirm.

[2] We set forth some preliminary matters which are useful to our analysis. We have long held that a dissolution decree

which approves and incorporates into the decree the parties' property settlement agreement is "a judgment of the court itself." *Chamberlin v. Chamberlin*, 206 Neb. 808, 818, 295 N.W.2d 391, 397 (1980). See *Strunk v. Chromy-Strunk*, 270 Neb. 917, 708 N.W.2d 821 (2006). It has been observed that once the court adopts the agreement and sets it forth as a judgment of the court with corresponding ordering language, the contractual character of the property settlement agreement is subsumed into the court-ordered judgment. *Henderson v. Henderson*, 307 N.C. 401, 298 S.E.2d 345 (1983). "At that point the court and the parties are no longer dealing with a mere contract between the parties." *Id*. at 407, 298 S.E.2d at 350. Thus, in the present case, we are considering the meaning of a judgment rather than a contract.

The decree dissolving a marriage becomes final and operative on the date of death of one of the parties to the dissolution if such death occurs before 30 days have passed after entry of the decree. Neb. Rev. Stat. § 42-372.01(1) (Reissue 2008). See, also, Neb. Rev. Stat. § 42-372 (Reissue 2008). Thus, in the present case, the marital status of Brenda and Dale was fixed as divorced persons upon the happening of Dale's death.

[3,4] We have held that the district court, in the exercise of its broad jurisdiction over marriage dissolutions, retains jurisdiction to enforce all terms of approved property settlement agreements. *Strunk v. Chromy-Strunk*, *supra*. A court that has jurisdiction to make a decision also has the power to enforce it by making such orders as are necessary to carry its judgment or decree into effect. *Id*. The obligations of the decree involved in this case concern property rights. The district court revived the action at the request of Dale's estate, which sought to enforce the terms of the property settlement agreement. Thus, in the present case, "the action taken by the district court [was] nothing more and nothing less than enforcing that portion of the decree which obligated" the parties regarding Dale's life insurance policies. See *Dennis v. Dennis*, 6 Neb. App. 461, 465, 574 N.W.2d 189, 192 (1998).

In Nebraska, appellate courts have repeatedly considered the meaning of a dissolution decree after the death of one of the parties particularly as to the terms of the decree pertaining

to life insurance policies. E.g., *Hohertz v. Estate of Hohertz*, 19 Neb. App. 110, 802 N.W.2d 141 (2011) (considering meaning of provisions in decree regarding scope of deceased former husband's obligations to name former wife as beneficiary of death benefits). See, also, *Trueblood v. Roberts*, 15 Neb. App. 579, 732 N.W.2d 368 (2007) (considering meaning of provisions in decree regarding former wife's status as beneficiary of deceased former husband's life insurance policy). In doing so, we have applied the principles we articulated in *Pinkard v. Confederation Life Ins. Co.*, 264 Neb. 312, 647 N.W.2d 85 (2002).

[5] Under Nebraska law, the general rule is that divorce does not affect a beneficiary designation in a life insurance policy. *Id*. This rule is based on the notion that the beneficiary's claim to the proceeds evolves from the terms of the policy rather than the status of the marital relationship. *Id*. But a spouse may waive such a beneficiary interest in a divorce decree. See *id*. See, also, *Strong v. Omaha Constr. Indus. Pension Plan*, 270 Neb. 1, 701 N.W.2d 320 (2005), *abrogated in part, Kennedy v. Plan Administrator for DuPont Sav. and Investment Plan*, 555 U.S. 285, 129 S. Ct. 865, 172 L. Ed. 2d 662 (2009).

[6] In this case, the trial court determined that although the beneficiary forms for Dale's life insurance policies still listed Brenda as the designated beneficiary of the policies at the time of his death, Brenda had unambiguously relinquished her beneficiary rights in the life insurance policies by virtue of the terms of the property settlement agreement. In making this determination, the trial court relied on the principles explained in *Pinkard*. In *Pinkard*, we followed the waiver rule and explained that under the waiver rule, the focus of whether a spouse has waived such a beneficiary interest

> should be upon the language of the dissolution decree and any agreement which sets forth the intentions of the parties concerning property rights. If the dissolution decree and any property settlement agreement incorporated therein manifest the parties' intent to relinquish all property rights, then such agreement should be given that effect. We make no distinction among IRA's, life

> insurance proceeds, or other types of annuities that designate the beneficiary in the event of the death of the payee.

264 Neb. at 318, 647 N.W.2d at 89.

A competing rule, the document rule, has been discussed but not adopted in our case law. The relative merits of each rule have been compared. See *Strong v. Omaha Constr. Indus. Pension Plan, supra* (Connolly, J., dissenting; Stephan, J., joins). In Nebraska, pursuant to U.S. Supreme Court precedent, the document rule is limited to benefit plans governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. (2006 & Supp. V 2011), and therefore, it does not apply to the present case. See *Kennedy v. Plan Administrator for DuPont Sav. and Investment Plan, supra* (abrogating in part *Strong v. Omaha Constr. Indus. Pension Plan, supra*).

[7-9] A decree is a judgment, and once a decree for dissolution becomes final, its meaning, including the settlement agreement incorporated therein, is determined as a matter of law from the four corners of the decree itself. See *Metropolitian Life Ins. Co. v. Beaty*, 242 Neb. 169, 493 N.W.2d 627 (1993); *Hohertz v. Estate of Hohertz*, 19 Neb. App. 110, 802 N.W.2d 141 (2011). In *Hohertz*, the Court of Appeals summarized the applicable principles as follows:

> The principles of law regarding the meaning of a judgment are well settled. Ambiguity exists in a document when a word, phrase, or provision therein has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Strunk v. Chromy-Strunk*, 270 Neb. 917, 708 N.W.2d 821 (2006). If the contents of a dissolution decree are unambiguous, the decree is not subject to interpretation and construction, and the intention of the parties must be determined from the contents of the decree. *Boyle v. Boyle*, 12 Neb. App. 681, 684 N.W.2d 49 (2004). In such a case, the effect of the decree must be declared in the light of the literal meaning of the language used. See *Bokelman v. Bokelman*, 202 Neb. 17, 272 N.W.2d 916 (1979).

19 Neb. App. at 115, 802 N.W.2d at 145.

The trial court's order quotes the language of the property settlement agreement at length and concludes that the decree is unambiguous and that Brenda waived and relinquished her interest in Dale's life insurance policies. We have quoted the property settlement agreement language above and need not repeat it at length here. We note, however, that paragraph VI of the property settlement agreement provided that Dale "shall be awarded all interest in any pension plans, stocks, retirement accounts, 401(k), IRA, *life insurance policy* and checking or savings account in [Dale's] name, free from any claim of [Brenda]." (Emphasis supplied.)

Paragraph IX of the property settlement agreement provides that "each party acknowledges that the properties set aside to him or her . . . will be [a] release and discharge, as between themselves, of all rights, claims, interests and obligations of each party in and to the said properties." Furthermore, paragraph X(b) of the property settlement agreement provides that Brenda

> waives and relinquishes any and all interest or rights of any kind, character, or nature whatsoever, . . . and renounces all benefits which would otherwise pass to [Brenda] from [Dale] by intestate succession or by virtue of the provisions of any Will executed before this Settlement Agreement which she, as wife, or as widow, or otherwise, has had, now has, or might hereafter have against [Dale], or, in the event of his death, as an heir at law, surviving spouse, or otherwise. [Brenda] waives and relinquishes any and all interest, present and future, in any and all property, real, personal, or otherwise, now owned by [Dale] or hereafter acquired, and including all property set aside for him in this agreement . . . .

We find no ambiguity in the decree. Under paragraph VI, the life insurance policies in Dale's name were awarded to Dale, and under paragraphs IX and X(b), Brenda waived and relinquished all interest in property set aside to Dale. Similar waiver language was at issue in *Pinkard v. Confederation Life Ins. Co.*, 264 Neb. 312, 647 N.W.2d 85 (2002), and we concluded that the former wife therein waived her beneficiary interest in an annuity by entering into a property

settlement agreement and that although the former husband had not changed the beneficiary designation after the divorce, the waiver was effective. Upon our independent review, we conclude as a matter of law that under the terms of the decree, Brenda unambiguously waived her beneficiary interest in Dale's life insurance policies. The district court was correct when it so concluded.

[10] In this case, Brenda filed a "Motion to Modify/Reform Property Settlement Agreement." And in the "Pre-Trial Conference Order," Brenda contended that parol evidence would clarify the parties' intent in what she claimed was an ambiguous property settlement agreement or, in the alternative, serve as a basis to modify and reform the property settlement agreement to reflect her version of the parties' intentions. In Nebraska, we have stated that where parties to a divorce action voluntarily execute a property settlement agreement which is approved by the dissolution court and incorporated into a divorce decree from which no appeal is taken, its provisions will not thereafter be vacated or modified in the absence of fraud or gross inequity. *Strunk v. Chromy-Strunk*, 270 Neb. 917, 708 N.W.2d 821 (2006). Elsewhere, it is generally considered appropriate for a court to modify or vacate a decree after the death of a party for the limited purpose of establishing property rights where there has been fraud or lack of process. See 27A C.J.S. *Divorce* § 401 (2005). In this case, no appeal was taken regarding property rights awarded in the decree, and Brenda has not alleged that there was a fraud or gross inequity in connection with the entry of the decree.

Brenda's contentions that we consider parol evidence or modify the property settlement agreement are founded on the proposition that the property settlement agreement is ambiguous, a proposition we have already rejected. Under the unambiguous terms of the property settlement agreement, Brenda relinquished her beneficiary rights to Dale's life insurance policies. Where the language used in the property settlement agreement is unambiguous, we are bound to consider such language from the four corners of the agreement itself, and what the parties thought the agreement meant is irrelevant. *Strunk v. Chromy-Strunk, supra*.

Many of the arguments and supporting authorities urged upon us for consideration in this case are taken from cases where contracts or other documents were at issue. These topics include parol evidence and reformation. As noted, the property settlement agreement once approved and incorporated into the decree becomes a judgment rather than a contract. *Id*. And the meaning of the judgment is a question of law. *Hohertz v. Estate of Hohertz*, 19 Neb. App. 110, 802 N.W.2d 141 (2011). The district court considered but rejected the contract concepts in its order; however, we believe these concepts are not suited to the central issue in this case. Thus, although our reasoning differs somewhat from that of the district court, we find no reversible error in its refusal to consider evidence other than the decree and its refusal to modify the decree.

CONCLUSION

Because we conclude as a matter of law that Brenda relinquished all rights to Dale's life insurance policies in the parties' property settlement agreement, which was incorporated into the decree, the district court did not err when it enforced the dissolution decree and ordered Brenda to withdraw claims to Dale's life insurance policies.

AFFIRMED.

CASSEL, J., concurring.

The majority opinion, which I join, is entirely correct under existing law. But existing law relies upon the general rule that divorce does not affect a beneficiary designation in a life insurance policy. This in turn requires close examination of the judgment dissolving the marriage. This framework lacks certainty, contradicts ordinary expectations, and encourages litigation. These flaws could easily be remedied by legislation, and I suggest a simple approach to accomplish this change.

The basic practical problem is that after a marriage is dissolved, the former spouses frequently do not change preexisting beneficiary designations in life insurance policies and similar contractual arrangements. Sometimes there is only a

brief interval between the dissolution and the policyholder's death.[1] That circumstance applies to the case before us. Other times, the policy owner overlooks the policy's existence. Or perhaps the owner encounters bureaucratic difficulties in changing the beneficiary. For whatever reason, beneficiary designations often go unchanged. Human experience teaches that most policyholders would prefer a death benefit pass to someone other than a former spouse. Of course, a few may feel otherwise.

A beneficiary's claim to the proceeds of a life insurance policy evolves from the terms of the policy rather than the status of the marital relationship.[2] The Nebraska Probate Code[3] recognizes that a provision for a nonprobate transfer on death in an insurance policy is nontestamentary.[4] This focus on the policy leads to the general rule that divorce does not affect a beneficiary designation in a life insurance policy.[5]

While the general rule is correct on a theoretical level, in practice it breaks down, because it operates contrary to ordinary human expectations. The response of most courts, including this one, is to scrutinize the marital dissolution documents searching for a "waiver" of the beneficiary designation by the surviving former spouse. Sometimes the court will find a waiver.[6] Other times, no waiver can be found.[7] As Justices Connolly and Stephan recognized in the context of the federal Employee Retirement Income Security Act of 1974

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[1] See *Larsen v. Northwestern Nat. Life Ins.*, 463 N.W.2d 777 (Minn. App. 1990).

[2] See *Pinkard v. Confederation Life Ins. Co.*, 264 Neb. 312, 647 N.W.2d 85 (2002), citing *Larsen v. Northwestern Nat. Life Ins.*, *supra* note 1.

[3] Neb. Rev. Stat. §§ 30-2201 to 30-2902, 30-3901 to 30-3923, and 30-4001 to 30-4045 (Reissue 2008, Cum. Supp. 2012 & Supp. 2013).

[4] See § 30-2715(a).

[5] See *Pinkard*, *supra* note 2.

[6] See, e.g., *id.*; *Sorensen v. Nelson*, 342 N.W.2d 477 (Iowa 1984).

[7] See, e.g., *Trueblood v. Roberts*, 15 Neb. App. 579, 732 N.W.2d 368 (2007); *Lynch v. Bogenrief*, 237 N.W.2d 793 (Iowa 1976).

(ERISA),[8] whether a waiver has occurred often depends upon hairline distinctions.[9]

Under ERISA, Congress has implemented a scheme employing a document rule that looks solely to the beneficiary designation in the plan documents.[10] "[B]y giving a plan participant a clear set of instructions for making his own instructions clear, ERISA forecloses any justification for enquiries into nice expressions of intent, in favor of the virtues of adhering to an uncomplicated rule."[11] A document rule "yield[s] simple administration, avoid[s] double liability, and ensure[s] that beneficiaries get what's coming quickly, without the folderol essential under less-certain rules."[12]

But courts have favored the waiver rule because they perceive that the document rule will lead to windfalls where the surviving former spouse intended to waive the interest.[13] Ultimately, this is a policy decision. And by inaction, our Legislature has acquiesced in the waiver rule applied in this court's jurisprudence.[14] Thus, while I favor the document rule as a matter of policy, I recognize that this court should not judicially implement a document rule.

And without addressing the perceptions of fairness underlying the waiver rule, the document rule would merely substitute one flawed approach for another. The appellant in the case

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[8] 29 U.S.C. § 1001 et seq. (2006 & Supp. V 2011).

[9] See *Strong v. Omaha Constr. Indus. Pension Plan*, 270 Neb. 1, 701 N.W.2d 320 (2005) (Connolly, J., dissenting; Stephan, J., joins), *abrogated in part, Kennedy v. Plan Administrator for DuPont Sav. and Investment Plan*, 555 U.S. 285, 129 S. Ct. 865, 172 L. Ed. 2d 662 (2009).

[10] See *Kennedy, supra* note 9.

[11] *Id.*, 555 U.S. at 301.

[12] *Fox Valley & Vic. Const. Wkrs. Pension F. v. Brown*, 897 F.2d 275, 283 (7th Cir. 1990) (Easterbrook, Circuit Judge, dissenting; Bauer, Chief Judge, and Manion, Circuit Judge, join), *abrogated in part, Kennedy, supra* note 9.

[13] See *Strong, supra* note 9 (Connolly, J., dissenting; Stephan, J., joins).

[14] See *Spady v. Spady*, 284 Neb. 885, 824 N.W.2d 366 (2012) (when appellate court has judicially construed statute and construction has not evoked amendment, presumed that Legislature acquiesced in determination of Legislature's intent).

before us does not go so far as to suggest adoption of the document rule. Rather, she urges us to expand the scope of our examination under the waiver rule. Instead of focusing on only the dissolution decree and the property settlement agreement incorporated into it, she would have us look to extrinsic evidence of all of the surrounding circumstances. Thoughtful judges have advocated this approach.[15] But I disagree, because the expansive waiver rule would move further away from the simplicity, speed, efficiency, and cost savings promised by the document rule.

In my view, the best solution is a twofold legislative approach: (1) adoption of a general rule that divorce automatically revokes a prior designation of a former spouse as a beneficiary in a life insurance policy or similar nontestamentary transfer upon death and (2) subject to the automatic revocation upon divorce, adoption of the document rule.

The first recommendation is easily accomplished—indeed, there is an existing model in the Nebraska Probate Code. Section 30-2333 revokes a disposition of property by will to a former spouse, unless the will specifically provides otherwise. In other words, a provision for a former spouse in a will made before dissolution of the marriage will not result in property going to the former spouse. Instead, the property will pass as if the former spouse died first.

In the context of a life insurance policy or other nontestamentary transfer, the statute could simply state that a divorce or dissolution of marriage revokes any designation of the former spouse as a beneficiary where the designation was made before the date of the dissolution decree. This would permit a life insurance policyholder to retain a former spouse as a beneficiary by express conduct. It would merely require the owner to reinstate the beneficiary designation after the divorce. And in most cases, it would automatically effectuate the policyholder's intent that the death benefit not go to the former spouse. The automatic revocation rule, coupled with the document rule, would allow policyholders to effectuate their intent and enable beneficiaries and issuing companies to

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[15] See *Trueblood v. Roberts*, *supra* note 7 (Sievers, Judge, concurring).

maximize speed and efficiency of distributions while minimizing expenses.

Thus, the court today correctly declines the appellant's invitation to expand its review under the waiver rule to evidence outside of the divorce decree and the associated property settlement agreement. But a better approach is available, and I commend it to the Legislature.

PAUL D. POTTER, APPELLANT, V. BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA ET AL., APPELLEES.

844 N.W.2d 741

Filed March 21, 2014. No. S-13-544.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.
2. **Public Officers and Employees: Immunity: Liability.** Qualified immunity protects government officials acting in their individual capacities from civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.
3. ____: ____: ____. Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments and protects all but the plainly incompetent or those who knowingly violate the law.
4. **Constitutional Law: Civil Rights: Actions.** A private right of action to vindicate violations of rights, privileges, or immunities secured by the Constitution and laws of the United States is created by 42 U.S.C. § 1983 (2006).
5. **Constitutional Law: Due Process: Tort-feasors.** The 14th Amendment's Due Process Clause does not extend to citizens a right to be free of injury wherever the State may be characterized as the tort-feasor.
6. **Due Process.** Procedural due process limits the ability of the government to deprive people of interests that constitute "liberty" or "property" interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard.
7. **Due Process: Termination of Employment.** Neither liberty nor property interests are at stake when an at-will employee loses a job but remains as free as before to seek another.
8. **Due Process: Libel and Slander.** Standing alone, stigma to one's reputation through defamatory statements is not sufficient to invoke the procedural protection of the Due Process Clause.

9. **Due Process: Public Officers and Employees: Termination of Employment: Libel and Slander.** If, in the course of subjecting an at-will employee to the present injury of termination, the State attaches to the employee a "badge of infamy" that impairs future employment opportunities, liberty interests come into play.
10. **Due Process: Public Officers and Employees: Termination of Employment: Libel and Slander: Words and Phrases.** The combination of stigmatizing state action coupled with some more tangible interest, thereby giving rise to a protectable interest under the 14th Amendment, is referred to as "stigma plus."
11. **Due Process: Public Officers and Employees: Termination of Employment: Libel and Slander.** Once a termination of employment qualifies as "stigma plus," due process is violated if the employee challenges the substantial truth of the defamatory statement and has not been given an opportunity for a name-clearing hearing.
12. **Libel and Slander: Words and Phrases.** A stigma is a mark or token of infamy, disgrace, or reproach.
13. **Due Process: Public Officers and Employees: Termination of Employment: Libel and Slander.** The requisite stigma for a stigma-plus claim has generally been found when an employer has accused an employee of serious character defects such as dishonesty, immorality, criminality, racism, and the like; it must be more than allegations of incompetence or the fact of the employment decision itself.
14. **Civil Rights: Due Process: Public Officers and Employees: Termination of Employment: Libel and Slander.** A supervisor is not responsible under a 42 U.S.C. § 1983 (2006) stigma-plus claim for unauthorized rumors circulating among employees.
15. **Civil Rights: Employer and Employee: Liability.** There is no respondeat superior liability under 42 U.S.C. § 1983 (2006).
16. **Due Process: Public Officers and Employees: Termination of Employment: Libel and Slander.** The requirement of public dissemination in stigma-plus claims limits constitutional claims to those instances where the stigmatizing charge is likely to be disseminated widely enough to damage the discharged employee's standing in the community or foreclose future job opportunities.
17. ____: ____: ____: ____. What is sufficient to constitute "public disclosure" in a stigma-plus claim will vary with the circumstances of each case.
18. ____: ____: ____: ____. Statements protected by qualified privilege do not pass the stigma-plus test.
19. **Public Officers and Employees: Libel and Slander: Words and Phrases.** Conditional or qualified privilege comprehends communications made in good faith, without actual malice, with reasonable or probable grounds for believing them to be true, on a subject matter in which the author of the communication has an interest, or in respect to which the author has a duty—public, personal, private, legal, judicial, political, moral, or social—made to a person having a corresponding interest or duty.

Appeal from the District Court for Lancaster County: STEPHANIE F. STACY, Judge. Affirmed.

Abby Osborn, of Shiffermiller Law Office, P.C., L.L.O., for appellant.

John C. Wiltse, of University of Nebraska, and David R. Buntain, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellees.

HEAVICAN, C.J., CONNOLLY, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

MCCORMACK, J.

NATURE OF CASE

A former temporary employee brought action under 42 U.S.C. § 1983 (2006) against the Board of Regents of the University of Nebraska (Board of Regents) and two of its managers after an e-mail circulated the day of the employee's termination of employment, warning coworkers to alert campus police and lock their doors if they saw him. The employee makes a "stigma plus" claim that he was deprived of a liberty interest in his good name without due process of law in violation of the 14th Amendment to the U.S. Constitution. The Board of Regents asserts that it is shielded by sovereign immunity and is not a "person" under § 1983 or Neb. Rev. Stat. § 20-148 (Reissue 2012) and that the managers are protected by qualified sovereign immunity because the alleged violation was not clearly established. The district court granted summary judgment in favor of the defendants, and the employee appeals the judgment. We affirm.

BACKGROUND

Paul D. Potter was a student at the University of Nebraska-Lincoln (University) studying electrical engineering. From 2006 to 2009, Potter was a part-time student employee working for the Communications and Information Technology Department (CIT) as a help desk technician at the call center located in Miller Hall on the University's east campus. Potter often provided technical support at nearby Agricultural Hall, where the office of the vice chancellor was located. The assistant vice chancellor was the unit director for CIT.

Potter began working full time in 2009, while still a student. The full-time employment offer stated that the "temporary appointment" was to begin October 28, 2009, and "may last until" August 14, 2010, but could "be ended for any reason and without notice."

A background check conducted in relation to the full-time position revealed that in 2004, Potter had been charged with burglary, battery, and stalking, and had pled guilty to the misdemeanor offenses of trespass on an unenclosed curtilage, harassing a witness to hinder a report, and battery. He had been fined and sentenced to 12 months of probation. The chancellor's office discussed these matters with Potter, and there is a notation on a copy of his criminal record to "disregard" the 2004 charges. The University also became aware at this time that Potter was on probation for a recent conviction of driving under the influence.

Around the same time that Potter was given the new temporary appointment, Potter's manager at the call center was promoted to a position outside of CIT and a new manager, Terry Bockstadter, transferred in. Robert Losee was the information technology coordinator and Bockstadter's supervisor.

CIT was also moving at that time to a fee-for-service charging model. As a result, CIT technicians were expected to keep time-tracking records with appropriate codes for services provided. Potter and other technicians struggled with the transition. Notes and e-mails reflect that beginning February 15, 2010, and continuing up to July 12, Potter was repeatedly counseled that he needed to do better with his timesheets.

In June 2010, Potter was asked to sign a statement reflecting issues that needed to be rectified "in order for [him] to continue to be an effective part of the CIT Help Desk." These issues included the accurate and timely submission of time-tracking reports and Potter's failure to communicate daily availability status. Potter refused to sign the statement.

Sometime before July 20, 2010, Losee contacted human resources about the possibility of terminating Potter's employment. Pursuant to standard University procedure, human resources completed a "threat assessment" in relation to the possible termination. The threat assessment for Potter noted

manager concerns based on Potter's "previous reaction of getting upset over discussion on work performance," a decrease in sociability in the last year, and his criminal record. The threat assessment was forwarded to campus police to determine whether there was any cause for concern. The record does not directly reflect what campus police communications took place regarding the threat assessment.

On the morning of July 20, 2010, two police officers arrived at Potter's place of work and escorted him away. Apparently unbeknownst to Potter or anyone else, a bench warrant for Potter's arrest had been issued after he missed a court date in relation to his probation for the conviction of driving under the influence. Potter testified in his deposition that he had not received the mailing advising him of the court date.

Potter did not explain to his superiors or coworkers the circumstances surrounding the police visit and his sudden departure, which was witnessed by Bockstadter. Potter explained that he did not say anything, because he thought Bockstadter had been the one to alert the police of the outstanding warrant. Losee alerted human resources that two plainclothes Lincoln Police Department officers had been looking for Potter at his place of work.

The decision to terminate Potter's employment was finalized that afternoon. A personnel coordinator consulted human resources about drafting a release to employees in what had recently become known as the EdMedia department (formerly CIT), pursuant to University procedure to ensure the safety of University technology when an employee with access to sensitive technological equipment is terminated. The proposed release did not mention termination of any employee, but advised that the EdMedia department would be changing passwords and access privileges. The proposed release was sent via e-mail to a few select University employees.

Human resources asked that the recipients of the e-mail be discreet and explained:

> We will move forward with termination of [Potter] tomorrow if possible. We are not sure when that will

> happen. It will depend if [Potter] shows up to work. HR, [University] Police and EAD will be involved in the termination meeting.
>
> At this point the police have been unable to locate [Potter].

Potter did not show back up to work and did not advise Bockstadter or Losee as to the reason for his unexpected and police-escorted departure. On the afternoon of July 21, 2010, an administrative employee sent an e-mail to 27 University employees working in either Miller Hall or Agricultural Hall. The e-mail stated:

> Judy went around this afternoon to let available staff members know of the situation regarding the termination of . . . Potter, Help Desk student worker. If you see him in the building, please shut and lock your door and call me . . . and I will alert the Campus Police. We do not need to be fearful but cautious and aware of who is in our building.

Potter was in court the morning of July 21, 2010, responding to the bench warrant. He explained in his deposition that he could not be reached while in court. When he arrived at east campus later that afternoon, Potter received an e-mail from a coworker telling him that his coworkers were told to call the police if they saw him. According to Potter, another coworker who also received the e-mail told him that an administrative employee was crying and telling people to check their e-mail and lock their doors. According to Potter, that coworker told Potter that the administrative employee had "implied" that Potter had a gun.

When Potter saw campus police, he left without incident. Potter subsequently received a letter dated July 22, 2010, informing him of his termination effective that same date.

In addition to those employees who received the e-mail, Potter identified three other persons who were warned of his possible presence on campus that day.

First, according to Potter, an employee working in Agricultural Hall told him someone had come in and told her "there was an alert that there was somebody on campus."

Second, Potter's CIT manager from 2006 to 2009 was defending her dissertation in Agricultural Hall when her advisor warned her that they may have to go into "lockdown." She learned from the vice chancellor's office that the warning related to Potter. She testified that she also heard a "rumor" that Potter had a gun.

Third, according to the aforementioned former CIT manager, Losee had told the assistant vice chancellor's wife about the alert. Losee had apparently attempted to contact the assistant vice chancellor/CIT unit director at his home, but he was out of town. Losee told the assistant vice chancellor's wife, who had answered the telephone, that if Potter showed up, she should not let him in.

According to Potter, that same assistant vice chancellor later apologized to him for the way his termination was handled. The assistant vice chancellor explained there had been a "mistake."

Potter stated that since the incident, he has not returned to east campus. But he has not had any trouble enrolling in classes, which he takes at the main campus. He was able to obtain employment as a network manager with a retirement home, but was laid off for lack of funds for the position. He is currently self-employed. Potter presented no evidence that prospective employers were aware or were likely to become aware of the events that transpired on July 21, 2010. Potter presented no evidence that the community at large was aware or likely to become aware of the incident.

Potter sued the Board of Regents and Bockstadter and Losee in their individual capacities. Potter alleged a cause of action under § 1983 and § 20-148, for being deprived of a liberty interest in his good name without due process of law, in violation of the 14th Amendment to the U.S. Constitution. Potter also alleged an action for discrimination under Neb. Rev. Stat. § 48-1104 (Reissue 2010), but that claim is no longer asserted on appeal. The principal relief sought was compensatory damages for loss of reputation, emotional distress, and humiliation, but he also stated claims for declaratory and injunctive relief.

Potter did not seek reinstatement of his employment with the University.

The district court granted summary judgment in favor of the defendants. The court found the evidence insufficient to create a genuine issue of material fact that the statements in the e-mail stigmatized Potter by seriously damaging his reputation or that the statement foreclosed other employment opportunities; thus, Potter's due process rights were not violated. The court found that even if they were violated, sovereign immunity protected the defendants from the claim. As to Bockstadter and Losee, the court found that the constitutional right allegedly violated had not been clearly established and that thus, the claim was barred by qualified immunity. Potter appeals.

ASSIGNMENTS OF ERROR

Potter assigns that the district court erred in finding (1) that there was no genuine issue of material fact that he had not sufficiently suffered a constitutional violation and (2) that Potter's alleged right was not clearly established at the time.

STANDARD OF REVIEW

[1] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.[1]

ANALYSIS

Potter admits he is no longer pursuing equitable relief. Instead, he seeks monetary relief for the alleged deprivation of his right to procedural due process. The Board of Regents and Bockstadter and Losee in their official capacities are entitled to sovereign immunity and do not qualify as "persons" under

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[1] *Peterson v. Homesite Indemnity Co.*, *ante* p. 48, 840 N.W.2d 885 (2013).

§ 1983.[2] Section 20-148 is a procedural statute designed to allow plaintiffs to bypass administrative procedures in discrimination actions against private employers; it does not operate to waive sovereign immunity and has no application here.[3]

[2,3] We are presented with Potter's claims under § 1983 against Bockstadter and Losee for actions taken in their individual capacities under color of state law.[4] Qualified immunity protects government officials acting in their individual capacities from civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.[5] A qualified immunity analysis has two prongs: (1) whether the official violated a statutory or constitutional right and (2) whether the right was clearly established at the time of the challenged conduct.[6] Courts have discretion to decide which of the two prongs to address first.[7] Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments and protects all but the plainly incompetent or those who knowingly violate the law.[8] We agree with the district court

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[2] See, *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989); *Michael E. v. State*, 286 Neb. 532, 839 N.W.2d 542 (2013); *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010); *Shearer v. Leuenberger*, 256 Neb. 566, 591 N.W.2d 762 (1999), *disapproved on other grounds, Simon v. City of Omaha*, 267 Neb. 718, 677 N.W.2d 129 (2004).

[3] See, *Stanton v. Sims*, ___ U.S. ___, 134 S. Ct. 3, 187 L. Ed. 2d 341 (2013); *Ritchie v. Walker Mfg. Co.*, 963 F.2d 1119 (8th Cir. 1992); *Goolsby v. Anderson*, 250 Neb. 306, 549 N.W.2d 153 (1996); *Wiseman v. Keller*, 218 Neb. 717, 358 N.W.2d 768 (1984); *Sinn v. City of Seward*, 3 Neb. App. 59, 523 N.W.2d 39 (1994).

[4] See, e.g., *Hafer v. Melo*, 502 U.S. 21, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991).

[5] See, *Brandon v. Holt*, 469 U.S. 464, 105 S. Ct. 873, 83 L. Ed. 2d 878 (1985); *Michael E. v. State, supra* note 2.

[6] See, e.g., *Ashcroft v. al-Kidd*, 563 U.S. 731, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011).

[7] *Id.*

[8] *Messerschmidt v. Millender*, ___ U.S. ___, 132 S. Ct. 1235, 182 L. Ed. 2d 47 (2012).

that qualified immunity bars Potter's § 1983 action against Bockstadter and Losee.

[4-6] "Section 1983, which derives from § 1 of the Civil Rights Act of 1871, 17 Stat. 13, creates a private right of action to vindicate violations of 'rights, privileges, or immunities secured by the Constitution and laws' of the United States."[9] The 14th Amendment's Due Process Clause does not, however, extend to citizens a right to be free of injury wherever the State may be characterized as the tort-feasor.[10] Rather, procedural due process limits the ability of the government to deprive people of interests that constitute "liberty" or "property" interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard.[11] Procedural due process claims center on the "requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.'"[12]

[7,8] Neither liberty nor property interests are at stake when an at-will employee loses a job but remains as free as before to seek another.[13] Likewise, standing alone, stigma to one's reputation through defamatory statements is not sufficient to invoke the procedural protection of the Due Process Clause.[14]

[9] But one of the liberties protected by the 14th Amendment is the individual's right "'to engage in any of the common occupations of life.'"[15] And federal circuit

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[9] *Rehberg v. Paulk*, ___ U.S. ___, 132 S. Ct. 1497, 1501, 182 L. Ed. 2d 593 (2012).

[10] See *Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976).

[11] See *State v. Worm*, 268 Neb. 74, 680 N.W.2d 151 (2004).

[12] *Mathews v. Eldridge*, 424 U.S. 319, 348, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

[13] See, e.g., *Bishop v. Wood*, 426 U.S. 341, 96 S. Ct. 2074, 48 L. Ed. 2d 684 (1976); *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972); *Speer v. City of Wynne, Ark.*, 276 F.3d 980 (8th Cir. 2002); *Johnston v. Panhandle Co-op Assn.*, 225 Neb. 732, 408 N.W.2d 261 (1987).

[14] See *Paul v. Davis*, *supra* note 10.

[15] *Board of Regents v. Roth*, *supra* note 13, 408 U.S. at 572.

courts have universally held that if, in the course of subjecting an at-will employee to the present injury of termination, the State attaches to the employee a "'badge of infamy'" that impairs future employment opportunities, liberty interests come into play.[16]

[10] The combination of stigmatizing state action coupled with some more tangible interest, thereby giving rise to a protectable interest under the 14th Amendment, is referred to as "stigma plus."[17] It is the individual's status as a government employee and not his property interest in continued employment which furnishes the "plus" in at-will termination cases.[18]

[11] Once the termination qualifies as stigma plus, due process is violated if the employee challenges the substantial truth of the defamatory statement and has not been given an opportunity for a name-clearing hearing.[19] If no name-clearing hearing is provided, or if the hearing is inadequate, the former employee may sue for monetary damages.[20]

It appears that in the context of termination of at-will employment, more is required to allege the necessary level of defamation and dissemination in a stigma-plus due process claim than the kind of damage to reputation sufficient for a simple tort defamation claim.[21] Thus, the Second Circuit

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[16] See *Paul v. Davis*, *supra* note 10, 424 U.S. at 705. See, also, e.g., *Codd v. Velger*, 429 U.S. 624, 97 S. Ct. 882, 51 L. Ed. 2d 92 (1977); *Board of Regents v. Roth*, *supra* note 13; *Brown v. Simmons*, 478 F.3d 922 (8th Cir. 2007); *Ridpath v. Board of Governors Marshall University*, 447 F.3d 292 (4th Cir. 2006); *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262 (10th Cir. 1989); *Doe v. United States Dept. of Justice*, 753 F.2d 1092 (D.C. 1985).

[17] See, e.g., *Zutz v. Nelson*, 601 F.3d 842 (8th Cir. 2010); *State v. Norman*, 282 Neb. 990, 808 N.W.2d 48 (2012).

[18] *Dennis v. S & S Consolidated Rural H.S. Dist.*, 577 F.2d 338 (5th Cir. 1978).

[19] See *Paul v. Davis*, *supra* note 10. See, also, e.g., *Codd v. Velger*, *supra* note 16; *Board of Regents v. Roth*, *supra* note 13; *Brown v. Simmons*, *supra* note 16.

[20] *Patterson v. City of Utica*, 370 F.3d 322 (2d Cir. 2004).

[21] *Filgueiras v. Newark Pub. Schools*, 426 N.J. Super. 449, 45 A.3d 986 (2012).

requires that the defendant employer made stigmatizing statements about the plaintiff that call into question the plaintiff's good name, reputation, honor, or integrity or that denigrate the plaintiff's competence as a professional and impugn the plaintiff's professional reputation in such a fashion as to effectively put a significant roadblock in the plaintiff's continued ability to practice his or her profession.[22] The Ninth Circuit requires that the charge against the plaintiff is one that might seriously damage his or her standing and associations in the community.[23] The Sixth Circuit requires that the false, stigmatizing statements not be merely allegations of improper or inadequate performance, incompetence, neglect of duty, or malfeasance.[24] The Seventh Circuit requires a tangible loss of other employment as a result of a stigmatizing public disclosure.[25]

Most courts set forth several conjunctive elements for an at-will termination stigma-plus claim. The elements are variously stated and somewhat intertwined. We will utilize the test of the Eighth Circuit, which requires that (1) the public employer's reasons for the discharge stigmatized the employee by seriously damaging his standing and association in the community or by foreclosing employment opportunities that may otherwise have been available, (2) the public employer made the reason or reasons public, and (3) the employee denied the charges.[26]

[12,13] We have explained that a stigma is a mark or token of infamy, disgrace, or reproach.[27] The requisite stigma for a stigma-plus claim has generally been found when an employer has accused an employee of serious character defects such as dishonesty, immorality, criminality, racism,

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[22] *Segal v. City of New York*, 459 F.3d 207 (2d Cir. 2006); *Patterson v. City of Utica*, *supra* note 20.

[23] See *Llamas v. Butte Community College Dist.*, 238 F.3d 1123 (9th Cir. 2001).

[24] See *Brown v. City of Niota, Tenn.*, 214 F.3d 718 (6th Cir. 2000).

[25] See *Abcarian v. McDonald*, 617 F.3d 931 (7th Cir. 2010).

[26] See *Speer v. City of Wynne, Ark.*, *supra* note 13.

[27] *State v. Norman*, *supra* note 17.

and the like;[28] it must be more than allegations of incompetence or the fact of the employment decision itself.[29]

This case involves the alleged stigma arising from an implied character charge of dangerousness communicated in security warnings during an employee's termination. Specifically, the warnings at issue stated that Potter was being terminated that day and that persons who saw him should be "cautious" and lock their doors and notify campus police.

[14,15] We find insufficient evidence that either Bockstadter or Losee was responsible for any alleged statements or implications to the effect that Potter was roaming around east campus with a gun. A supervisor is not responsible under a § 1983 stigma-plus claim for unauthorized rumors circulating among employees.[30] The U.S. Supreme Court has made clear that there is no respondeat superior liability under § 1983.[31] The standard by which a supervisor is held liable under § 1983 in his or her individual capacity for the actions of a subordinate is extremely rigorous.[32] The plaintiff must establish that the supervisor personally participated in the unconstitutional conduct or was otherwise the moving force of the violation

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[28] See, e.g., *Board of Regents v. Roth*, *supra* note 13; *Ridpath v. Board of Governors Marshall University*, *supra* note 16; *Winegar v. Des Moines Indep. Com. School Dist.*, 20 F.3d 895 (8th Cir. 1994).

[29] See, e.g., *Zepp v. Rehrmann*, 79 F.3d 381 (4th Cir. 1996); *Jones v. University of Iowa*, 836 N.W.2d 127 (Iowa 2013); *Herrera v. Union No. 39 School Dist.*, 186 Vt. 1, 975 A.2d 619 (2009).

[30] See *Palmer v. City of Monticello*, 31 F.3d 1499 (10th Cir. 1994). See, also, *Lancaster v. Independent School Dist. No. 5*, 149 F.3d 1228 (10th Cir. 1998); *Silva v. Worden*, 130 F.3d 26 (1st Cir. 1997); *Fittshur v. Village of Menomonee Falls*, 31 F.3d 1401 (7th Cir. 1994); *Moore v. State of Ind.*, 999 F.2d 1125 (7th Cir. 1993); *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988).

[31] See, *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); *Board of Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997); *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

[32] *Mann v. Taser Intern., Inc.*, 588 F.3d 1291 (11th Cir. 2009).

by authorizing, approving, or knowingly acquiescing in the unconstitutional conduct.[33]

Potter only presented limited evidence of Bockstadter's and Losee's involvement in the e-mail and the corresponding verbal warnings. Potter did not present Bockstadter's or Losee's testimony, or the testimony of the author of the e-mail warning or the employee who verbally disseminated that warning. There are no admissions in the record pertaining to Bockstadter's or Losee's participation in the warnings. Nevertheless, based on the chain of events reflected in internal e-mails and Bockstadter's and Losee's positions within the EdMedia department, we will generously infer a material issue as to whether they were responsible for the alleged character charge. We will also accept for purposes of this appeal the hearsay testimony that Losee called the assistant vice chancellor's wife and told her not to open the door for Potter, because there was no objection to that testimony.

The alleged stigma in this case is unique. Because of highly publicized incidents of workplace and school violence and the mounting pressure on employers and educational institutions to proactively protect their employees and students from such violence,[34] the warnings may have merely communicated zealous security measures rather than a stigmatizing character charge. Even assuming there was a stigmatizing character charge, however, Potter failed to present a material issue that this charge seriously damaged his standing and association in the community or foreclosed employment opportunities that might otherwise have been available.

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[33] See, *Franklin v. Curry*, 738 F.3d 1246 (11th Cir. 2013); *Schneider v. City of Grand Junction Police Dept.*, 717 F.3d 760 (10th Cir. 2013); *Myers v. Bowman*, 713 F.3d 1319 (11th Cir. 2013); *Burlison v. Springfield Public Schools*, 708 F.3d 1034 (8th Cir. 2013); *Evans v. Chalmers*, 703 F.3d 636 (4th Cir. 2012); *Heyerman v. County of Calhoun*, 680 F.3d 642 (6th Cir. 2012); *Starr v. Baca*, 652 F.3d 1202 (9th Cir. 2011).

[34] See Kimberly Smith, *A Plea for Mandatory Disclosure: Urging Michigan's Legislature to Protect Employees Against Increasing Phenomena of Workplace Violence*, 79 U. Det. Mercy L. Rev. 611 (2002).

[16] There can be no "infamy" unless the character charge is sufficiently made public.[35] The requirement of public dissemination in stigma-plus claims limits constitutional claims to those instances where the stigmatizing charge is likely to be disseminated widely enough to damage the discharged employee's standing in the community or foreclose future job opportunities.[36]

Potter argues that dissemination of the warning to certain employees not in the building where he worked, and to the assistant vice chancellor's wife, means there was "public" dissemination and that, thus, that element of his claim has been met. He also points out that in *Putnam v. Keller*,[37] the court upheld the denial of summary judgment for defendants who had disseminated to the faculty and staff of several campuses, as well as to the local sheriff and county attorney, "'stay-away'" letters accusing a former employee of theft and other immoral conduct.

[17] But what is sufficient to constitute "public disclosure" in a stigma-plus claim will vary with the circumstances of each case.[38] In determining the degree of dissemination that satisfies the "public disclosure" requirement, courts must look to the potential effect of dissemination on the employee's standing in the community and the foreclosure of job opportunities.[39] Accordingly, in a different case, *Nuttle v. Ponton*,[40] a student who sought employment at the college where she studied did not state a stigma-plus claim, because the "'judiciary file'" against her was not disseminated outside the college.

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[35] See *State v. Norman*, *supra* note 17.

[36] See, e.g., *Donato v. Plainview-Old Bethpage Cent. School Dist.*, 96 F.3d 623 (2d Cir. 1996); *Eberhardt v. O'Malley*, 17 F.3d 1023 (7th Cir. 1994); *Wilcox v. Newark Valley Cent. School Dist.*, 107 A.D.3d 1127, 967 N.Y.S.2d 432 (2013).

[37] *Putnam v. Keller*, 332 F.3d 541, 547 (8th Cir. 2003).

[38] See, e.g., *Brandt v. Board of Co-op. Educational Services*, 820 F.2d 41 (2d Cir. 1987).

[39] *Id.*

[40] *Nuttle v. Ponton*, 544 F. Supp. 2d 175, 176 (W.D.N.Y. 2008).

Other than the assistant vice chancellor's wife, Potter did not allege that the warning was or would be disseminated outside of east campus. There is no evidence that the e-mail is maintained as part of Potter's personnel file and will be shared with prospective employers. As explained already, the statements were unique to the circumstances existing at the time they were made, and the stigma associated with the warnings is tempered by the commonsense understanding that proactive security measures do not always target those who are genuinely dangerous. In fact, Potter admitted that none of the people whom he knew and who had received the warning changed their opinion of his character as a result. Under the circumstances, the extent of the dissemination did not threaten to seriously damage his standing and association in the community or to foreclose employment opportunities that may otherwise have been available.

[18] Moreover, there is no material issue of fact that the statements were protected by qualified privilege. Statements protected by qualified privilege do not pass the stigma-plus test.[41]

[19] Conditional or qualified privilege comprehends communications made in good faith, without actual malice, with reasonable or probable grounds for believing them to be true, on a subject matter in which the author of the communication has an interest, or in respect to which the author has a duty—public, personal, private, legal, judicial, political, moral, or social—made to a person having a corresponding interest or duty.[42] Whether a qualified privilege exists is a matter of law.[43]

The warnings here were on a subject matter to which the authors had a moral duty, and the statements were made

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[41] See, *Abelli v. Ansonia Bd. of Educ.*, No. 3:12-cv-1432, 2013 WL 6587784 (D. Conn. Dec. 13, 2013); *Wilcox v. Newark Valley Cent. School Dist.*, *supra* note 36; *Sweet v. Tigard-Tualatin School Dist. #23J*, 124 Fed. Appx. 482 (9th Cir. 2005).

[42] *Turner v. Welliver*, 226 Neb. 275, 411 N.W.2d 298 (1987); *Helmstadter v. North Am. Biological*, 5 Neb. App. 440, 559 N.W.2d 794 (1997).

[43] *Id.*

to persons with a corresponding interest in their well-being. Publication is privileged if made for the purpose of protecting anyone—friend, employee, or stranger—against violence.[44]

There was no evidence from which one could reasonably find actual malice in disseminating the warning pertaining to Potter's discharge. While Bockstadter and Losee may have been mistaken about the need for the measures taken, there is no indication that they acted with knowledge that Potter presented no danger the day he was terminated or with reckless disregard to the truth of such implied character charge. Not only were Bockstadter and Losee aware of Potter's past criminal convictions, which included assault, there was documentation of emotional reactions to negative feedback and social withdrawal. Most significantly, Bockstadter and Losee were left in the dark after Potter was escorted off campus by police pursuant to an outstanding warrant of an unknown nature, and they had no knowledge of Potter's whereabouts or state of mind at the time of discharge. Potter testified that he worked as a technician throughout east campus, but especially in Agricultural Hall. The call center is located in Miller Hall. Thus, there is no indication that the extent of dissemination throughout Miller Hall and Agricultural Hall was in bad faith. Likewise, there was no evidence that Losee acted in bad faith when warning the assistant vice chancellor's wife of Potter's possible arrival at their home. The assistant vice chancellor was Potter's unit director.

Potter has failed to demonstrate a material issue as to whether Bockstadter and Losee violated a clearly established due process right. Indeed, we can find no other case in which a stigma-plus claim has arisen from warnings meant to protect employees and other persons believed to be in danger. Bockstadter and Losee made good faith judgments about how to best protect their employees, students, and the assistant vice chancellor's wife. They were protected by qualified immunity, and the court properly granted summary judgment in their favor.

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[44] See Restatement (Second) of Torts § 595, comment *g*. (1977).

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court granting summary judgment in favor of the defendants.

AFFIRMED.

WRIGHT and STEPHAN, JJ., not participating.

STATE OF NEBRASKA, APPELLEE, V.
ANTOINE D. YOUNG, APPELLANT.
844 N.W.2d 304

Filed March 21, 2014. No. S-13-557.

1. **DNA Testing: Appeal and Error.** A motion for DNA testing is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
2. ____: ____. In an appeal from a proceeding under the DNA Testing Act, the trial court's findings of fact will be upheld unless such findings are clearly erroneous.
3. **DNA Testing.** The DNA Testing Act, passed in 2001, was created to allow wrongfully convicted persons an opportunity to establish their innocence through DNA testing.
4. ____. A person in custody takes the first step toward obtaining possible relief under the DNA Testing Act by filing a motion requesting forensic DNA testing of biological material.
5. **DNA Testing: Evidence.** After a proper motion seeking forensic DNA testing has been filed, the State is required by Neb. Rev. Stat. § 29-4120(4) (Reissue 2008) to file an inventory of all evidence that was secured by the State or a political subdivision in connection with the case.
6. **DNA Testing: Collateral Attack.** An action under the DNA Testing Act is a collateral attack on a conviction and is civil in nature.
7. **DNA Testing: Proof.** The burden of proof under the DNA Testing Act is upon the defendant.
8. **DNA Testing: Affidavits: Evidence.** Under the DNA Testing Act, the defendant has the burden to provide the district court with affidavits or evidence at a hearing establishing the three required factual determinations for the district court under Neb. Rev. Stat. § 29-4120(5) (Reissue 2008).
9. **DNA Testing: Evidence.** Under the DNA Testing Act, DNA evidence which was available at trial but not pursued is not considered to have been unavailable.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Affirmed.

Michael J. Wilson, of Schaefer Shapiro, L.L.P., and Tracy Hightower-Henne, of Hightower Reff Law, for appellant.

Jon Bruning, Attorney General, and J. Kirk Brown for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

MCCORMACK, J.

NATURE OF CASE

Antoine D. Young appeals the order of the district court for Douglas County which denied Young's motion for DNA testing filed under the DNA Testing Act. The district court determined that Young had failed to provide sufficient evidence for the district court to make the three factual determinations required under Neb. Rev. Stat. § 29-4120(5) (Reissue 2008). We affirm.

BACKGROUND

On the afternoon of August 25, 2007, Ray S. Webb was fatally shot in Omaha, Nebraska. Two prosecution witnesses testified that they observed Young approach Webb's vehicle and fire the fatal shots from a handgun. Another prosecution witness testified that after hearing what he first thought were fireworks, he turned and saw a bearded man dressed in black standing at the driver's side of Webb's vehicle. Three defense witnesses testified that they witnessed the shooting and that the shooter was not Young. Young testified that he was not present at the shooting because he spent the afternoon at a family gathering.

During the investigation of the shooting, officers recovered a long-sleeved, black T-shirt from a grassy area near the shooting. Officers also found several shell casings. Neither the black T-shirt nor the shell casings have been DNA tested.

After a jury trial, Young was convicted of first degree murder and use of a deadly weapon in the commission of a felony. Young was sentenced to life imprisonment on the murder conviction and to 40 to 40 years' imprisonment on the weapons

conviction, to be served consecutively. We affirmed his convictions and sentences on direct appeal.[1]

On November 4, 2010, Young filed a pro se motion for DNA testing and appointment of counsel. On January 10, 2011, he filed a motion for leave to amend his pro se motion, as well as an amended motion for DNA testing. Following a telephonic hearing, the district court denied the motion for DNA testing. Through counsel, Young appealed, and we remanded with a mandate that the district court consider the issues raised in Young's amended motion.

In his final amended motion, Young requested that the black T-shirt be "tested for DNA evidence using mini STR-DNA, touch DNA and Y-STR DNA testing." Young asserted that "[t]he foregoing DNA testing methodologies were not effectively available at the time of [his] trial." According to the motion, "[m]ini STR, touch DNA and Y-STR testing methods allow for DNA testing of extremely small amounts of biological material and enable conclusive results to be drawn even from mixed DNA samples." Young's motion stated that the DNA profiles could be uploaded to "CODIS" to find the real shooter.

Young also requested that the shell casings be tested. In his motion, he alleged that a new forensic testing technique called Cartridge Electrostatic Recovery and Analysis (CERA) can lift a fingerprint from spent shell casings. The motion alleged that fingerprints, which result from the deposit of body oils, are "'biological materials'" within the meaning of the DNA Testing Act. According to the motion, this technology is being developed in England and was not effectively available at the time of the trial. Young alleged the fingerprints can be used to find the real shooter.

At a hearing held on December 13, 2012, Young presented no evidence. After taking the matter under advisement, the district court denied the request for DNA testing, because Young had failed to provide sufficient evidence for the district court to make the three factual determinations required under § 29-4120(5). Young now appeals.

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[1] *State v. Young*, 279 Neb. 602, 780 N.W.2d 28 (2010).

ASSIGNMENT OF ERROR

Young claims that the district court erred when it denied his request for DNA testing of the black T-shirt and shell casings found at the scene of the shooting.

STANDARD OF REVIEW

[1,2] A motion for DNA testing is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.[2] The trial court's findings of fact will be upheld unless such findings are clearly erroneous.[3]

ANALYSIS

[3] The question presented on appeal is whether Young satisfied his evidentiary burdens under the DNA Testing Act. The DNA Testing Act, passed in 2001, was created to allow wrongfully convicted persons an opportunity to establish their innocence through DNA testing.[4] The Legislature found that new forensic DNA testing procedures make it possible to obtain more informative and accurate results than the earlier DNA testing could produce.[5]

[4] A person in custody takes the first step toward obtaining possible relief under the DNA Testing Act by filing a motion requesting forensic DNA testing of biological material.[6] Under § 29-4120(1), DNA testing is available for any biological material that (a) is related to the investigation or prosecution that resulted in such judgment, (b) is in the actual or constructive possession or control of the State or is in the possession or control of others under circumstances likely to safeguard the integrity of the biological material's original physical composition, and (c) was not previously subjected to DNA testing or can be subjected to retesting with more current DNA techniques that

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[2] *State v. Haas*, 279 Neb. 812, 782 N.W.2d 584 (2010).

[3] *Id.*

[4] Neb. Rev. Stat. § 29-4117 (Reissue 2008).

[5] Neb. Rev. Stat. § 29-4118 (Reissue 2008).

[6] § 29-4120.

provide a reasonable likelihood of more accurate and probative results.

[5] After a proper motion seeking forensic DNA testing has been filed, the State is required by § 29-4120(4) to file an inventory of all evidence that was secured by the State or a political subdivision in connection with the case. Then, "[u]pon consideration of affidavits or after a hearing," pursuant to § 29-4120(5), the court "shall" order testing upon a determination that (1) such testing was effectively not available at the time of trial, (2) the biological material has been retained under circumstances likely to safeguard the integrity of its original physical composition, and (3) such testing may produce noncumulative, exculpatory evidence relevant to the claim that the person was wrongfully convicted or sentenced.

[6-8] An action under the DNA Testing Act is a collateral attack on a conviction and is civil in nature.[7] Therefore, the burden of proof is upon the defendant.[8] Part of that burden is to provide the district court with affidavits or evidence at a hearing establishing the three required factual determinations for the district court under § 29-4120(5).

Here, Young was given an opportunity at the December 13, 2012, hearing to provide the district court with evidence concerning the prior availability of the proposed DNA testing and the ability of the proposed DNA testing to produce relevant evidence. His failure to present even a modicum of evidence at the hearing left the district court with little choice but to deny the motion.

For the proposed DNA test on the black T-shirt, Young failed to provide evidence establishing any of the three determinations required under § 29-4120(5). In particular, there is no evidence that the mini STR-DNA, touch DNA, and Y-STR DNA testing was effectively unavailable at the time of Young's trial. Young argues that DNA testing techniques are continually evolving and that the requested tests were necessarily not available at Young's trial. But such an assertion is

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[7] See *State v. Poe*, 271 Neb. 858, 717 N.W.2d 463 (2006).

[8] See *State v. Malcom*, 12 Neb. App. 432, 675 N.W.2d 728 (2004).

insufficient. At the time of Young's trial in 2009, DNA testing was widely available to defendants.[9] The DNA tests available at the time of trial were able to pull biological material from clothing to isolate a DNA profile.[10]

[9] The DNA Testing Act gives inmates access to evolving scientific technology, but it was not intended to allow an inmate a second chance to perform DNA testing which was available at trial.[11] Evidence which was available but not pursued is not considered to have been unavailable.[12] The district court did not abuse its discretion in denying the motion for DNA testing on the black T-shirt, because Young failed to present evidence establishing that the mini STR-DNA, touch DNA, and Y-STR DNA testing was effectively unavailable to him at the time of his trial in 2009.

The failure of proof problem also plagues Young's CERA testing request for the shell casings. Again, Young failed to present any evidence. Young asserted in his motion that CERA testing can lift fingerprints from shell casings and that the lifted fingerprints are "biological materials" as contemplated under the DNA Testing Act. To state the obvious, the DNA Testing Act allows for testing of only DNA.[13] There is no evidence that the proposed CERA test is in fact a DNA test. The amended motion describes it as simply "the ability to 'lift' a fingerprint," while the State and Young both make opposite assertions, without evidence, as to whether it is a test for DNA. Thus, there is no evidence explaining how this new forensic technique will be able to produce meaningful DNA evidence in this case. And finally, there is no evidence in the record that the CERA testing was not effectively available at the time of trial. The assertion that the test was recently developed is not enough.

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[9] See, *State v. Buckman*, 267 Neb. 505, 675 N.W.2d 372 (2004); *State v. Lotter*, 266 Neb. 758, 669 N.W.2d 438 (2003).

[10] See *id.*

[11] See *State v. Haas*, *supra* note 2.

[12] *Id.*

[13] See § 29-4117.

For the reasons stated, we hold that the district court did not abuse its discretion in denying the motion for CERA testing of the shell casings. Young failed to present evidence establishing that CERA testing was a new DNA test capable of producing noncumulative, exculpatory evidence and that the test was effectively unavailable at the time of his 2009 trial.

CONCLUSION

For the reasons stated herein, we affirm the district court's denial of Young's amended motion for DNA testing.

AFFIRMED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. STEPHEN L. SMITH, RESPONDENT.

844 N.W.2d 318

Filed March 28, 2014. No. S-07-397.

1. **Disciplinary Proceedings: Appeal and Error.** In attorney discipline and admission cases, the Nebraska Supreme Court reviews recommendations de novo on the record, reaching a conclusion independent of the referee's findings. When credible evidence is in conflict on material issues of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Disciplinary Proceedings.** The Nebraska Supreme Court, as the court which disbars a lawyer, also has the inherent power to reinstate him or her to the practice of law.
3. ____. In considering an application for reinstatement to the practice of law, the Nebraska Supreme Court owes a solemn duty to protect the public and the legal profession, which consideration must be performed without regard to feelings of sympathy for the applicant.
4. ____. A mere sentimental belief that a disbarred lawyer has been punished enough will not justify his or her restoration to the practice of law. The primary concern is whether the applicant, despite the former misconduct, is now fit to be admitted to the practice of law and whether there is a reasonable basis to believe that the present fitness will permanently continue into the future.
5. **Disciplinary Proceedings: Proof.** A disbarred attorney has the burden of proof to establish good moral character to warrant reinstatement. The applicant must carry this burden by clear and convincing evidence.

6. ____: ____. The proof of good character must exceed that required under an original application for admission to the bar because it must overcome the former adverse judgment of the applicant's character.
7. ____: ____. The more egregious the underlying misconduct, the heavier an applicant's burden to prove his or her present fitness to practice law.

Original action. Judgment of reinstatement.

Kent L. Frobish, Assistant Counsel for Discipline, for relator.

Stephen L. Smith, pro se.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

PER CURIAM.

INTRODUCTION

Stephen L. Smith was disbarred in 2008. He filed a petition for reinstatement on March 11, 2013. Following a hearing, the referee recommended that the petition for reinstatement be denied. For the reasons stated below, we grant Smith's petition.

FACTUAL BACKGROUND

Smith was admitted to the practice of law in 1994, and was a solo practitioner in Omaha, Nebraska. Smith was retained by Thomas Kawa in 2005. In 2006, Kawa filed a grievance against Smith, alleging that Smith had not provided him an accounting of an advance payment made by Kawa.

Smith neglected to respond to the grievance for some time, and formal charges were filed against him. Though Smith eventually responded, his responses were both incomplete and not prompt. The Counsel for Discipline requested that this court grant a motion for judgment on the pleadings. We did so and, following briefing and argument, disbarred Smith on March 7, 2008. A more complete recitation of the underlying facts can be found in our opinion disbarring Smith.[1]

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[1] *State ex rel. Counsel for Dis. v. Smith*, 275 Neb. 230, 745 N.W.2d 891 (2008).

On March 11, 2013, Smith filed a petition for reinstatement. This court appointed a referee, and a hearing was held on Smith's petition. The evidence presented at the hearing included Smith's testimony, six letters of recommendation, a letter from a psychologist, a certificate of completion for continuing legal education relating to trust accounts, and a Douglas County District Court order and Nebraska Court of Appeals memorandum opinion, case No. A-09-611 filed April 23, 2010, relating to a suit filed by Smith against Kawa.

In his testimony, Smith gave a narrative generally explaining that his failure to respond to the initial charges was primarily due to the fact that he knew he did not have the proper records to do so. Smith indicated in his testimony that if the full story regarding the incident with Kawa had been known at the time of the formal charges, Smith might not have been disbarred. But Smith also takes full responsibility for his failings in not keeping proper trust account records and in not properly responding to the grievance and charges against him.

Smith indicated that he had a mental health evaluation done following his disbarment and that the doctor recommended medication, counseling, and further testing. Smith admits that he did none of these things. He testified that he did not take the recommended medication because he did not feel it was necessary. He stated that the symptoms he was experiencing were situational and that he felt they would improve over time.

Smith also testified that he periodically met with an acquaintance who was a psychologist to "discuss[] things." As for the testing, there was an indication from the record that he was also informed by the acquaintance psychologist that it would not be beneficial.

One exhibit is a letter from that psychologist who indicated that the depression Smith suffered from at the time of disbarment was a "normal reaction" and that Smith "indicated that he has addressed the issues for which he was disbarred. Such actions show he moved out of the depression and worked toward his future."

In his testimony, Smith indicated that he had spent the last 5 years working with his wife, who owned and operated a

restaurant and a property management business. Smith testified that his job involved legal aspects, though he never acted as an attorney. He also testified that he had completed a class on trust account management. He testified that he knew he would not have the same problems in the future and that he has a "better idea of how to keep clear and accurate records."

The Counsel for Discipline presented no evidence and did not object to Smith's petition. At the hearing, the Counsel for Discipline did not specifically request that any conditions be placed on Smith's reinstatement; at oral argument, the Counsel for Discipline suggested that Smith be supervised for a period of time following any reinstatement. Following the hearing, the referee recommended that Smith's petition be denied.

Smith now asks this court to grant his petition for reinstatement. The Counsel for Discipline agrees that the petition should be granted.

STANDARD OF REVIEW

[1] In attorney discipline and admission cases, we review recommendations de novo on the record, reaching a conclusion independent of the referee's findings.[2] When credible evidence is in conflict on material issues of fact, however, we consider and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.[3]

ANALYSIS

[2-4] As the court which disbarred Smith, we have the inherent power to reinstate him to the practice of law.[4] We recognize, however, that in considering an application for reinstatement to the practice of law, this court owes a solemn duty to protect the public and the legal profession, which consideration must be performed without regard to feelings of sympathy for

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[2] *State ex rel. Counsel for Dis. v. Scott*, 275 Neb. 194, 745 N.W.2d 585 (2008).

[3] *Id.*

[4] See *id.*

the applicant.[5] A mere sentimental belief that a disbarred lawyer has been punished enough will not justify his or her restoration to the practice of law. The primary concern is whether the applicant, despite the former misconduct, is now fit to be admitted to the practice of law and whether there is a reasonable basis to believe that the present fitness will permanently continue into the future. In short, reinstatement after disbarment is difficult.[6]

[5-7] A disbarred attorney has the burden of proof to establish good moral character to warrant reinstatement.[7] The applicant must carry this burden by clear and convincing evidence.[8] The proof of good character must exceed that required under an original application for admission to the bar because it must overcome the former adverse judgment of the applicant's character.[9] It naturally follows that the more egregious the underlying misconduct, the heavier an applicant's burden to prove his or her present fitness to practice law.[10]

In concluding that Smith's petition should be granted, we examine our prior case law. In *State ex rel. Counsel for Dis. v. Scott*,[11] we had previously suspended the petitioner for 1 year for deliberately lying to a court and, 1 week later, disbarred him following his conviction for filing a false tax return. He filed for reinstatement 8 years later.

This court denied his petition. We noted that after the petitioner was released from prison, he had taken "positive steps" to "reestablish himself in the community."[12] We also noted that "he now takes responsibility for his past mistakes and appears to be remorseful."[13] But we still found the "evidence

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[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] See *id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.* at 203, 745 N.W.2d at 592.

[13] *Id.*

of [the petitioner's] present moral character to be insufficient to overcome the heavy burden imposed by his past egregious misconduct."[14]

In denying the petition, we distinguished the petitioner's case from others by noting that the petitioner had a "significantly greater history of dishonest conduct."[15] We also noted that the petitioner had failed to make restitution to the Internal Revenue Service, despite the fact that he still owed between $300,000 and $400,000.[16]

We also denied a petition for reinstatement in *State ex rel. Counsel for Dis. v. Mellor*.[17] There, the petitioner was disbarred following a federal felony conviction for possession of child pornography. We noted that following his release from prison, the petitioner sought treatment with a counselor and was making "'excellent' progress."[18] But we noted two incidents, which the petitioner's therapist described as "'slip[s]'" caused by stress, and expressed concern, observing that the "practice of law is a profession which can be attended by significant stress."[19]

We also shared "the referee's concern that the record include[d] no testimony or written support from lawyers or judges regarding [the petitioner's] present character and fitness to practice law."[20] We further concluded that the petitioner had not "demonstrated that he [was] currently competent to practice law in Nebraska," as prior to disbarment, the petitioner's law practice in Nebraska was rather limited and he had twice failed the Kansas bar examination.[21]

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[14] *Id.*

[15] *Id.*

[16] *Scott*, *supra* note 2.

[17] *State ex rel. Counsel for Dis. v. Mellor*, 271 Neb. 482, 712 N.W.2d 817 (2006).

[18] *Id.* at 484, 712 N.W.2d at 819.

[19] *Id.* at 486, 712 N.W.2d at 821.

[20] *Id.*

[21] *Id.* at 488, 712 N.W.2d at 822.

But we granted a petition for reinstatement in *State ex rel. NSBA v. Kinney*.[22] There, the petitioner was disbarred after embezzling about $23,000 from his employer's law firm. And several years prior, the petitioner had taken about $20,000 in fees, which fees were later repaid. About 20 years after his disbarment, the petitioner sought reinstatement.

In granting his petition, we noted that following disbarment, the petitioner had sought treatment for alcohol, drugs, and gambling addictions, and then lived in a halfway house. He also participated in Alcoholics Anonymous meetings. The petitioner acknowledged having an occasional glass of wine with friends, but had no recurrence of his previous alcohol problems.

In addition to treatment, the petitioner had paid restitution to his former employer. And his work history following disbarment was related to his legal background and showed that he was a "responsible and trusted employee."[23] The petitioner was also involved with various charitable organizations. Two persons testified as to the petitioner's good moral character, and another 11 individuals, including two lawyers, wrote letters supporting his reinstatement. Finally, we observed that the petitioner had taken full responsibility for his past mistakes.

Because the petitioner had not practiced law in 20 years, this court required him to pass the bar examination as a condition to reinstatement. We were concerned with his knowledge of the law, despite the fact that he had been working in the legal field and had attended continuing legal education.

We conclude that Smith should be reinstated to the practice of law. While Smith clearly holds some animosity with respect to the circumstances resulting in his disbarment, he has accepted responsibility for his role in those events, notably for his failure to respond to the inquiries of the Counsel for Discipline and for not keeping more accurate trust account records. We also note that Smith was convicted of no crime

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[22] *State ex rel. NSBA v. Kinney*, 274 Neb. 412, 740 N.W.2d 607 (2007).

[23] *Id.* at 417, 740 N.W.2d at 612.

and that results of separate litigation show that Kawa's allegations against Smith were without merit.

The record shows that Smith's failure to respond to the Counsel for Discipline was due at least in part to the fact that he was depressed. Smith sought some treatment for this condition, though he declined to take medication. The record indicates that this depression was situational and has lifted since the time of his disbarment.

Since disbarment, Smith has remained actively working with his wife's company, using skills he attained as an attorney, though not practicing law. Moreover, Smith has taken a course in trust account management. And the record includes several letters recommending Smith's reinstatement written by three judges, one attorney, two doctors, and Smith's wife. While such steps alone are not enough to mandate reinstatement, they certainly support the conclusion that reinstatement might well be appropriate.

Finally, and notably, the Counsel for Discipline does not object to Smith's reinstatement.

Upon due consideration, we grant Smith's petition for reinstatement, subject to 2 years of probation and monitoring. In addition, because trust account practices were an issue in Smith's disbarment and he proposes to reenter solo practice, we also condition Smith's reinstatement upon a requirement that Smith retain, at his expense, an accountant to audit his trust account every 6 months during his probationary period, with the audit results to be submitted to the Counsel for Discipline.

CONCLUSION

We conclude that Smith has met his burden of showing by clear and convincing evidence that, subject to the above conditions, his license to practice law should be reinstated. His application is granted, and costs are taxed to Smith.

JUDGMENT OF REINSTATEMENT.

STATE OF NEBRASKA, APPELLEE, V. MARK S. FILHOLM, APPELLANT.

848 N.W.2d 571

Filed March 28, 2014. No. S-12-759.

1. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
2. **Criminal Law: Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
3. **Effectiveness of Counsel: Appeal and Error.** When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record. Otherwise, the issue will be procedurally barred.
4. **Effectiveness of Counsel: Records: Appeal and Error.** The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. The determining factor is whether the record is sufficient to adequately review the question.
5. **Appeal and Error.** An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.
6. ____. A generalized and vague assignment of error that does not advise an appellate court of the issue submitted for decision will not be considered.
7. ____. An argument that does little more than to restate an assignment of error does not support the assignment, and an appellate court will not address it.
8. **Effectiveness of Counsel: Proof: Appeal and Error.** An appellant must make specific allegations of the conduct that he or she claims constitutes deficient performance by trial counsel when raising an ineffective assistance claim on direct appeal. General allegations that trial counsel performed deficiently or that trial counsel was ineffective are insufficient to raise an ineffective assistance claim on direct appeal and thereby preserve the issue for later review.
9. **Trial: Effectiveness of Counsel: Evidence: Appeal and Error.** An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing.

10. **Effectiveness of Counsel: Postconviction: Appeal and Error.** In the context of direct appeal, like the requirement in postconviction proceedings, mere conclusions of fact or law are not sufficient to allege ineffective assistance of counsel.
11. **Effectiveness of Counsel: Proof: Appeal and Error.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. An appellate court may address the two prongs of this test, deficient performance and prejudice, in either order.
12. **Effectiveness of Counsel**: **Proof.** To show prejudice on a claim of ineffective assistance of counsel, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
13. **Judgments: Appeal and Error.** A correct result will not be set aside merely because the lower court applied the wrong reasoning in reaching that result.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and IRWIN and RIEDMANN, Judges, on appeal thereto from the District Court for Lancaster County, KAREN B. FLOWERS, Judge. Judgment of Court of Appeals affirmed as modified.

Peter K. Blakeslee for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

CASSEL, J.

I. INTRODUCTION

Mark S. Filholm was convicted and sentenced for first degree sexual assault. On direct appeal, Filholm raised seven claims of ineffective assistance of trial counsel. The Nebraska Court of Appeals found three of his claims to be without merit for failure to allege prejudice.[1] We granted further review primarily to address whether, on direct appeal, allegations of prejudice are required to assert claims of ineffective assistance of trial counsel. Because resolution of such claims turns upon

[1] *State v. Filholm*, No. A-12-759, 2013 WL 4518211 (Neb. App. Aug. 27, 2013) (selected for posting to court Web site).

the sufficiency of the record, specific allegations of the deficient conduct are required. But allegations of prejudice are not necessary on direct appeal. In these three instances, the record is not sufficient to review the claim. We modify the Court of Appeals' decision accordingly, and as so modified, we affirm the court's decision.

II. BACKGROUND

The charges against Filholm arose out of the sexual assault of A.B. in her home in the early morning of June 25, 2011. The jury returned a verdict finding Filholm guilty of first degree sexual assault, and he appealed. Although he had been represented by counsel from the Lancaster County public defender's office at trial, Filholm obtained different appellate counsel.

On appeal, Filholm claimed that he received ineffective assistance of counsel at trial in seven respects. He claimed that his trial counsel was ineffective for failing to (1) consult and present the testimony of a DNA expert witness and effectively cross-examine the State's expert witness, (2) obtain video surveillance footage from a bar and interview two witnesses who could establish his presence at that bar on the night of the assault, (3) file a motion for new trial alleging juror misconduct, (4) call witnesses who could explain the presence of A.B.'s DNA on his fingers, (5) object to improper refreshing of a witness' recollection at trial, (6) move for mistrial when two of the State's witnesses used the term "victim," and (7) file a motion in limine to prevent use of the term "rape" and take appropriate measures when the term was used at trial.

The Court of Appeals rejected Filholm's ineffective assistance of counsel claims. In several instances, the court concluded either that his claims were without merit or that the record was insufficient for review. However, as to three of his claims, the court found his allegations "to be insufficient because he fails to allege how he was prejudiced by his counsel's performance."[2]

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[2] *Id.* at *7.

Filholm further alleged that his conviction was not supported by sufficient evidence. The Court of Appeals rejected this claim and affirmed his conviction and sentence.

Filholm petitioned for further review, which we granted. We directed the parties to file supplemental briefs on the necessary specificity for allegations of prejudice in ineffective assistance of counsel claims made on direct appeal. After supplemental briefs were filed, we heard oral arguments.

III. ASSIGNMENTS OF ERROR

Filholm assigns, reordered, that the Court of Appeals erred in (1) finding that he was not denied effective assistance of counsel and (2) finding that his conviction was supported by sufficient evidence.

IV. STANDARD OF REVIEW

[1] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact.[3] When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.[4] With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*,[5] an appellate court reviews such legal determinations independently of the lower court's decision.[6]

[2] In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have

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[3] *State v. Davlin*, 277 Neb. 972, 766 N.W.2d 370 (2009).

[4] *Id.*

[5] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[6] *Davlin*, *supra* note 3.

found the essential elements of the crime beyond a reasonable doubt.[7]

V. ANALYSIS

1. Ineffective Assistance of Counsel

[3] Filholm assigns that the Court of Appeals erred in rejecting his ineffective assistance claims, which he was required to raise on direct appeal. When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record. Otherwise, the issue will be procedurally barred.[8] Although Filholm suggested at oral argument that we should abandon this rule, we decline to do so. Thus, because Filholm obtained new counsel on direct appeal, he was required to raise those claims of ineffective assistance known to him or apparent from the record in order to preserve them for review.

As noted above, Filholm alleged that his trial counsel was ineffective in seven ways. The Court of Appeals found that three of these claims lacked merit for failure to allege prejudice.

We granted further review primarily to address whether, on direct appeal, allegations of prejudice are required to assert claims of ineffective assistance of trial counsel. The proposition that, on direct appeal, an appellant is required to allege prejudice when claiming ineffective assistance of trial counsel appears to have originated from the Court of Appeals' holding in *State v. Derr*.[9]

In *Derr*, David A. Derr's direct appeal assigned as error several general allegations of ineffective assistance of trial counsel. Derr's brief confessed that it presented no argument, but merely asserted that the record was insufficient to address the claims. The court's opinion stated that "Derr [did] not

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[7] *State v. Castillas*, 285 Neb. 174, 826 N.W.2d 255 (2013).

[8] *State v. Ramirez*, 284 Neb. 697, 823 N.W.2d 193 (2012).

[9] *State v. Derr*, 19 Neb. App. 326, 809 N.W.2d 520 (2011).

allege how any of trial counsel's actions prejudiced him."[10] But the opinion also stated that Derr "failed to allege that any of counsel's actions prejudiced him or, stated another way, did not sufficiently allege his ineffective assistance of counsel claims."[11] The Court of Appeals concluded that Derr's failure "constrained [it] to find that Derr's assertions of ineffective assistance of counsel [were] without merit."[12] The Court of Appeals has cited *Derr* in two subsequent cases, *State v. Kays*[13] and *State v. Warrack*,[14] for the proposition that an appellant must specifically allege prejudice when claiming ineffective assistance of counsel on direct appeal.

To the extent that the Court of Appeals spoke of Derr's failure to allege prejudice, it was incorrect. We reject the proposition that an appellant is required on direct appeal to allege prejudice when claiming ineffective assistance of trial counsel. We therefore disapprove *State v. Kays*[15] and *State v. Warrack*[16] to the extent they support such a proposition, and we disapprove *State v. Derr*[17] to the extent it has been applied to that effect. Rather, an appellant must make specific allegations of trial counsel's deficient performance.

[4] On direct appeal, the resolution of ineffective assistance of counsel claims turns upon the sufficiency of the record. We have often said that the fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. The determining factor is whether the record is sufficient to adequately review the question.[18] We have held in countless cases that the record on direct appeal was insufficient for assessing ineffective assistance of counsel

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[10] *Id*. at 329, 809 N.W.2d at 522.

[11] *Id*. at 327, 809 N.W.2d at 521-22.

[12] *Id.* at 327, 809 N.W.2d at 522.

[13] *State v. Kays*, 21 Neb. App. 376, 838 N.W.2d 366 (2013).

[14] *State v. Warrack*, 21 Neb. App. 604, 842 N.W.2d 167 (2014).

[15] *Kays*, *supra* note 13.

[16] *Warrack*, *supra* note 14.

[17] *Derr*, *supra* note 9.

[18] *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013).

claims.[19] This is because the trial record reviewed on appeal is "devoted to issues of guilt or innocence" and does not usually address issues of counsel's performance.[20]

However, in those cases where we determined that the record on direct appeal was sufficient to address a claim of ineffective assistance of trial counsel, the record itself either affirmatively proved or rebutted the merits of the claim. We found the record established either that trial counsel's performance was not deficient,[21] that the appellant could not establish prejudice,[22] or that trial counsel's actions could not be justified as a part of any plausible trial strategy.[23] Thus, it is not an

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[19] See, e.g., *Watt*, *supra* note 18; *State v. McClain*, 285 Neb. 537, 827 N.W.2d 814 (2013); *State v. Ramirez*, 285 Neb. 203, 825 N.W.2d 801 (2013); *State v. Huston*, 285 Neb. 11, 824 N.W.2d 724 (2013); *State v. Freemont*, 284 Neb. 179, 817 N.W.2d 277 (2012); *State v. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012), *cert. denied* ___ U.S. ___, 133 S. Ct. 158, 184 L. Ed. 2d 78; *State v. Pullens*, 281 Neb. 828, 800 N.W.2d 202 (2011); *State v. Seberger*, 279 Neb. 576, 779 N.W.2d 362 (2010); *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010); *State v. Robinson*, 278 Neb. 212, 769 N.W.2d 366 (2009); *State v. Davis*, 276 Neb. 755, 757 N.W.2d 367 (2008); *State v. Jones*, 274 Neb. 271, 739 N.W.2d 193 (2007); *State v. Davlin*, 272 Neb. 139, 719 N.W.2d 243 (2006); *State v. Moyer*, 271 Neb. 776, 715 N.W.2d 565 (2006); *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006); *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005); *State v. King*, 269 Neb. 326, 693 N.W.2d 250 (2005); *State v. Brown*, 268 Neb. 943, 689 N.W.2d 347 (2004); *State v. Cook*, 266 Neb. 465, 667 N.W.2d 201 (2003); *State v. Leibhart*, 266 Neb. 133, 662 N.W.2d 618 (2003); *State v. Kelley*, 265 Neb. 563, 658 N.W.2d 279 (2003); *State v. Long*, 264 Neb. 85, 645 N.W.2d 553 (2002); *State v. McLemore*, 261 Neb. 452, 623 N.W.2d 315 (2001); *State v. Hittle*, 257 Neb. 344, 598 N.W.2d 20 (1999).

[20] *Massaro v. United States*, 538 U.S. 500, 505, 123 S. Ct. 1690, 155 L. Ed. 2d 714 (2003). See, also, *State v. Young*, 279 Neb. 602, 780 N.W.2d 28 (2010).

[21] See, e.g., *Nolan*, *supra* note 19; *State v. Hubbard*, 267 Neb. 316, 673 N.W.2d 567 (2004).

[22] See, e.g., *State v. Morgan*, 286 Neb. 556, 837 N.W.2d 543 (2013); *Watt*, *supra* note 18; *Hubbard*, *supra* note 21; *State v. Cody*, 248 Neb. 683, 539 N.W.2d 18 (1995).

[23] See, e.g., *State v. Rocha*, 286 Neb. 256, 836 N.W.2d 774 (2013); *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003), *disapproved on other grounds*, *State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

appellant's allegations of prejudice that have guided our review of ineffective assistance claims on direct appeal, but the allegations of deficient conduct.

[5-8] Filholm was required to specifically assign and argue his trial counsel's allegedly deficient conduct. This arises from a fundamental rule of appellate practice. An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.[24] A generalized and vague assignment of error that does not advise an appellate court of the issue submitted for decision will not be considered.[25] Similarly, an argument that does little more than to restate an assignment of error does not support the assignment, and an appellate court will not address it.[26] It naturally follows that on direct appeal, an appellate court can determine whether the record proves or rebuts the merits of a claim of ineffective assistance of trial counsel only if it has knowledge of the specific conduct alleged to constitute deficient performance. We therefore hold that an appellant must make specific allegations of the conduct that he or she claims constitutes deficient performance by trial counsel when raising an ineffective assistance claim on direct appeal. General allegations that trial counsel performed deficiently or that trial counsel was ineffective are insufficient to raise an ineffective assistance claim on direct appeal and thereby preserve the issue for later review.

[9,10] Although our case law makes clear that specific allegations of prejudice are required within the context of postconviction relief,[27] we view such a requirement on direct appeal as a waste of time and resources. As we have noted, the trial record on appeal is devoted to issues of guilt or innocence, not counsel's performance. Thus, to require an appellant to allege prejudice from ineffective assistance on

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[24] *State v. Eagle Bull*, 285 Neb. 369, 827 N.W.2d 466 (2013).

[25] *State v. Pereira*, 284 Neb. 982, 824 N.W.2d 706 (2013).

[26] *Id*.

[27] See, e.g., *State v. Baker*, 286 Neb. 524, 837 N.W.2d 91 (2013); *State v. Jim*, 275 Neb. 481, 747 N.W.2d 410 (2008); *State v. Harris*, 274 Neb. 40, 735 N.W.2d 774 (2007).

direct appeal would require him or her to allege facts in detail that are likely not within the appellate record or known to the defendant without further inquiry. And an ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing.[28] We therefore see no justification for requiring an appellant to allege prejudice when claiming ineffective assistance of trial counsel on direct appeal. That said, we emphasize that in the context of direct appeal, like the requirement in postconviction proceedings, mere conclusions of fact or law are not sufficient.[29] Because Filholm was required to raise those claims of ineffective assistance known to him or apparent from the record, specific allegations were required.

We now turn to the merits of Filholm's ineffective assistance of counsel claims. However, before conducting our analysis, we recall several general principles pertaining to ineffective assistance of counsel.

[11,12] The test for ineffective assistance of counsel is well settled. To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[30] the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.[31] An appellate court may address the two prongs of this test, deficient performance and prejudice, in either order.[32] To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.[33]

(a) Insufficient Allegations

The Court of Appeals found that three of Filholm's ineffective assistance of counsel claims lacked merit for failure to

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[28] *Watt, supra* note 18.

[29] See *State v. Dean*, 264 Neb. 42, 645 N.W.2d 528 (2002).

[30] *Strickland, supra* note 5.

[31] *State v. Marks*, 286 Neb. 166, 835 N.W.2d 656 (2013).

[32] *Id.*

[33] *State v. McGuire*, 286 Neb. 494, 837 N.W.2d 767 (2013).

allege prejudice. These claims include that his trial counsel was ineffective for failing to (1) consult and present the testimony of a DNA expert witness and to effectively cross-examine the State's expert witness, (2) obtain video surveillance footage from a bar and interview two witnesses who could establish his presence at that bar on the night of the assault, and (3) file a motion for new trial alleging juror misconduct. The Court of Appeals correctly determined that Filholm was not entitled to relief on these issues on direct appeal.

[13] But based upon our holding above, we conclude that the Court of Appeals erred in reasoning that they failed because of insufficient allegations of prejudice. Rather, the record was insufficient to resolve these claims. A correct result will not be set aside merely because the lower court applied the wrong reasoning in reaching that result.[34]

The State argues that trial counsel could not be deficient for failing to file a motion for new trial if Filholm did not tell counsel, or allege that he told counsel, about his familiarity with a juror in time for trial counsel to file a timely motion. Filholm's complaint was raised on the record only at sentencing. But the record does not disclose when Filholm raised the matter with trial counsel. Thus, the record is not sufficient to address this claim on direct appeal.

In finding the record to be insufficient to address these claims, we make no comment whether these allegations of ineffective assistance would be sufficient to require an evidentiary hearing in the context of a motion for postconviction relief. We simply decline to reach these claims on direct appeal because the record is insufficient to do so.[35] We modify the Court of Appeals' decision on those three claims to reflect that the record is insufficient to address them.

(b) Insufficient Record

The Court of Appeals determined that the record was insufficient to resolve Filholm's claim that his trial counsel was ineffective for failing to interview witnesses who could have

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[34] See *State v. Chiroy Osorio*, 286 Neb. 384, 837 N.W.2d 66 (2013).

[35] See *Morgan*, *supra* note 22.

placed him in A.B.'s home and in her car on June 24, 2011, prior to the sexual assault in the early morning of June 25, and thereby explain the presence of her DNA on his fingers. We agree that the record is insufficient to resolve this claim.

(c) Remaining Claims

(i) Refreshing of Recollection

Filholm alleges that his trial counsel was ineffective for failing to object to the refreshing of a witness' recollection at trial. The Court of Appeals determined that Filholm could not establish prejudice from this claim, and we agree.

(ii) Use of Term "Victim"

Filholm asserts that his trial counsel was ineffective for failing to move for a mistrial after two of the State's witnesses used the term "victim" despite an order in limine prohibiting them from doing so. The Court of Appeals rejected this claim because it concluded that Filholm's trial counsel did not perform deficiently. We find no error in its analysis on this issue.

(iii) Use of Term "Rape"

Finally, Filholm alleges that his trial counsel was ineffective for failing to take three actions with respect to the term "rape." First, he claims that his trial counsel failed to include the term within his motion in limine. Second, he claims that his trial counsel failed to make a hearsay objection to A.B.'s statement at trial that Filholm had raped her. Third, he argues that his trial counsel failed to move to strike A.B.'s statement.

The Court of Appeals found that Filholm did not establish prejudice from his trial counsel's failure to include the term "rape" within his motion in limine, and we agree. Although the State argues that the court found insufficient allegations of prejudice on this issue, we read the court's opinion as rejecting the claim on the merits. The court also concluded that Filholm's trial counsel did not perform deficiently in failing to make a hearsay objection to A.B.'s statement or in failing to move to strike her statement. As these actions would have ultimately been unsuccessful, we see no error in the Court

of Appeals' conclusion that Filholm did not receive ineffective assistance.

2. Insufficient Evidence

Filholm assigns that there was insufficient evidence to support his conviction. We disagree. As we have already noted, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found Filholm guilty of the crime beyond a reasonable doubt.[36]

Filholm was charged with first degree sexual assault under Neb. Rev. Stat. § 28-319(1)(a) (Reissue 2008). Under that statute, a person commits the offense if he or she subjects another person to sexual penetration without that person's consent. The elements of penetration and absence of consent were undisputed at trial. Thus, this assignment of error turns on whether the State presented sufficient evidence to permit a rational jury to conclude beyond a reasonable doubt that Filholm was the man who sexually assaulted A.B.

A man entered A.B.'s home in the early morning of June 25, 2011, and awoke her by touching her face. The man's face was covered with a blanket, but he had a beard and smelled like cigarettes. Filholm admittedly had "sort of a goatee" and smelled strongly of cigarettes when he was apprehended by police.

The man removed A.B.'s clothing, digitally penetrated her, performed oral sex on her, and had sexual intercourse with her. He spoke during the assault, and A.B. recognized the voice as Filholm's because she had known him for several years. He then forced her to shower and washed out her mouth and vaginal area. When Filholm was found, his clothing was "significantly wet," but not in a way that was consistent with having urinated himself.

The man left just shortly before A.B.'s family returned from the family's restaurant. Filholm had visited the restaurant sometime that night and, thus, knew that A.B. was most likely at home alone. Although the timing of his visit was

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[36] See *Castillas, supra* note 7.

subject to conflicting evidence, the jury was presented with sufficient evidence from which it could conclude that Filholm had adequate time to commit the assault prior to the arrival of her family.

Finally, DNA samples taken from Filholm's person and clothing revealed A.B.'s DNA on his fingers and Filholm's semen on his underwear and on the outside of his pants.

Filholm argues that "a fair resolution of conflicts in the testimony, a weighing of the evidence, and a drawing of reasonable inferences from the facts can only lead to the conclusion that reasonable doubt existed as to [his] guilt."[37] But an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.[38] We determine only whether, based upon the evidence, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. It could. This assigned error lacks merit.

VI. CONCLUSION

We affirm Filholm's conviction and sentence. However, we reject the Court of Appeals' proposition that, on direct appeal, an appellant must allege prejudice when claiming ineffective assistance of counsel. The disposition of ineffective assistance claims on direct appeal turns on the sufficiency of the record. Thus, an appellant must make specific allegations of trial counsel's deficient conduct. Specific allegations of prejudice are not necessary at that stage. We therefore conclude that the Court of Appeals applied the wrong reasoning in finding that three of Filholm's ineffective assistance claims lacked merit for failure to allege prejudice. Rather, the record was insufficient to address those three claims. We modify the court's decision accordingly. Because the Court of Appeals correctly determined that Filholm was not entitled to relief on direct appeal, we affirm its decision as so modified.

AFFIRMED AS MODIFIED.

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[37] Memorandum brief for appellant in support of petition for further review at 5.

[38] *Castillas*, *supra* note 7.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE
OF THE NEBRASKA SUPREME COURT, RELATOR,
V. JOHN A. SELLERS, RESPONDENT.
844 N.W.2d 309

Filed March 28, 2014. Nos. S-13-060, S-13-497.

Original actions. Judgment of disbarment.

Kent L. Frobish, Assistant Counsel for Discipline, for relator.

No appearance for respondent.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

PER CURIAM.

INTRODUCTION

These cases are before the court on the voluntary surrenders of license filed by John A. Sellers, respondent, in cases Nos. S-13-060 and S-13-497, which we consolidate for purposes of opinion and disposition. On January 21, 2014, respondent filed a voluntary surrender in case No. S-13-060 and on February 10, respondent filed a voluntary surrender in case No. S-13-497. In case No. S-13-060, an application for temporary suspension containing one count was filed against respondent, and on March 27, 2013, respondent was temporarily suspended by order of this court. In case No. S-13-497, formal charges containing four counts were filed against respondent, with the first count containing the same allegations as those set forth in the application for temporary suspension filed in case No. S-13-060. We accept both of respondent's voluntary surrenders of his license and enter an order of disbarment.

STATEMENT OF FACTS

Respondent was admitted to the practice of law in the State of Nebraska on September 19, 2000. On January 23, 2013, the Committee on Inquiry of the Fifth Disciplinary District filed an application for temporary suspension against respondent

in case No. S-13-060. The application for temporary suspension contained one count, generally alleging neglect, failure to communicate, and misappropriation of funds. On January 31, we ordered respondent to show cause why he should not be temporarily suspended. Respondent did not file a response to the show cause order. Respondent was temporarily suspended by this court on March 27.

After respondent was temporarily suspended, the Counsel for Discipline of the Nebraska Supreme Court, relator, filed formal charges containing four counts against respondent on June 7, 2013, in case No. S-13-497. Count I of the formal charges contained the same allegations as alleged in the application for temporary suspension filed in case No. S-13-060. Counts II, III, and IV of the formal charges in case No. S-13-497 generally alleged that respondent neglected clients' cases, failed to communicate with clients, and misappropriated client funds. Respondent did not respond to the formal charges.

On January 21, 2014, respondent filed a voluntary surrender of his license in case No. S-13-060. In the January 21 voluntary surrender, respondent stated that he knowingly does not challenge or contest the truth of the allegations set forth in the application for temporary suspension. Respondent further stated that he freely and voluntarily waived his right to notice, appearance, or hearing prior to the entry of an order of disbarment and consented to the entry of an order of disbarment.

On January 23, 2014, we filed an order directing relator to file a response to respondent's January 21 voluntary surrender in case No. S-13-060, including the impact of such surrender on case No. S-13-497 if this court accepted the voluntary surrender filed in case No. S-13-060. Relator filed its response on January 31, stating, inter alia, that a voluntary surrender form pertaining to case No. S-13-497 had been tendered to respondent.

On February 10, 2014, respondent filed a voluntary surrender in case No. S-13-497. Respondent stated in the February 10 voluntary surrender that he knowingly does not challenge or contest the truth of the allegations set forth in the formal

charges. Respondent further stated that he freely and voluntarily waived his right to notice, appearance, or hearing prior to the entry of an order of disbarment and consented to the entry of an order of disbarment.

ANALYSIS

Neb. Ct. R. § 3-315 of the disciplinary rules provides in pertinent part:

> (A) Once a Grievance, a Complaint, or a Formal Charge has been filed, suggested, or indicated against a member, the member may voluntarily surrender his or her license.
>
> (1) The voluntary surrender of license shall state in writing that the member knowingly admits or knowingly does not challenge or contest the truth of the suggested or indicated Grievance, Complaint, or Formal Charge and waives all proceedings against him or her in connection therewith.

Pursuant to § 3-315 of the disciplinary rules, we find that by respondent's voluntary surrenders filed in cases Nos. S-13-060 and S-13-497, he has voluntarily surrendered his license to practice law and knowingly does not challenge or contest the truth of the allegations made against him in the application for temporary suspension and the formal charges. Further, respondent has waived all proceedings against him in connection therewith. We further find that respondent has consented to the entry of an order of disbarment.

CONCLUSION

Upon due consideration of the court files in these matters, we find that respondent has stated that he freely, knowingly, and voluntarily admits that he does not contest the allegations being made against him in the application for temporary suspension filed in case No. S-13-060 and the formal charges filed in case No. S-13-497. We accept respondent's voluntary surrender of his license to practice law filed January 21, 2014, in case No. S-13-060, and respondent's voluntary surrender of his license to practice law filed February 10 in case No. S-13-497. We find that respondent should be disbarred and

hereby order him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with all terms of Neb. Ct. R. § 3-316 of the disciplinary rules, and upon failure to do so, he shall be subject to punishment for contempt of this court. Accordingly, respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and Neb. Ct. R. §§ 3-310(P) (rev. 2014) and 3-323 of the disciplinary rules within 60 days after orders imposing costs and expenses, if any, are entered by the court.

JUDGMENT OF DISBARMENT.

RODEHORST BROTHERS, APPELLANT, V. CITY OF NORFOLK BOARD OF ADJUSTMENT, APPELLEE.

844 N.W.2d 755

Filed March 28, 2014. No. S-13-253.

1. **Zoning: Courts: Appeal and Error.** In appeals involving a decision of a board of adjustment, an appellate court reviews the decision of the district court, and irrespective of whether the district court took additional evidence, the appellate court is to decide if, in reviewing a decision of a board of adjustment, the district court abused its discretion or made an error of law. Where competent evidence supports the district court's factual findings, the appellate court will not substitute its factual findings for those of the district court.
2. **Abandonment: Intent: Words and Phrases.** Generally, the right to continue a nonconforming use may be lost through abandonment. Abandonment requires not only a cessation of the nonconforming use, but also an intent by the user to abandon the nonconforming use.
3. **Ordinances: Zoning.** Zoning laws should be given a fair and reasonable construction in light of the manifest intention of the legislative body, the objects sought to be attained, the natural import of the words used in common and accepted usage, the setting in which they are employed, and the general structure of the law as a whole.
4. ____: ____. Where the provisions of a zoning ordinance are expressed in common words of everyday use, without enlargement, restriction, or definition, they are to be interpreted and enforced according to their generally accepted meaning.
5. ____: ____. Nonconforming uses are disfavored because they reduce the effectiveness of zoning ordinances, depress property values, and contribute to the growth of urban blight.
6. **Zoning: Ordinances: Intent: Time.** Where a zoning law provides for the termination of a legal, nonconforming use after it has been "discontinued" for a

reasonable period, there is no requirement to show intent to abandon the nonconforming use.

7. **Zoning: Ordinances.** Whether a building is *usable* as a nonconforming use does not mean that it is actually *used* in that manner.
8. **Zoning: Ordinances: Words and Phrases.** A "use" variance is one which permits a use other than that prescribed by the particular zoning regulation. An "area" variance, on the other hand, has no relationship to a change of use. It is primarily a grant to erect, alter, or use a structure for a permitted use in a manner other than that prescribed by the restrictions of the zoning ordinance.
9. **Zoning: Ordinances.** Neb. Rev. Stat. § 19-910 (Reissue 2012) allows a board of adjustment to grant a variance from a zoning regulation only if strict application of the regulation, because of the unusual physical characteristics of the property existing at the time of the enactment, would result in exceptional practical difficulties or undue hardships to the owner.
10. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the party's brief.
11. **Zoning: Property.** While property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking.
12. ____: ____. Under *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978), relief is possible from a regulatory taking which does not deprive the owner of all economic use of the property.

Appeal from the District Court for Madison County: JAMES G. KUBE, Judge. Affirmed.

Glenn A. Rodehorst for appellant.

Clint Schukei, Norfolk City Attorney, for appellee.

WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

CONNOLLY, J.

I. SUMMARY

Rodehorst Brothers, a partnership (Rodehorst), owns a fourplex apartment building in Norfolk, Nebraska. The parties agree that the building's use as a fourplex (to house up to four families), in an area zoned R-2 for one- and two-family use, was a legal, nonconforming use. Neb. Rev. Stat. § 19-904.01 (Reissue 2012), as well as the applicable zoning ordinance, both provide that the right to continue such a use is lost if it has been discontinued for 1 year. Because the record shows that Rodehorst discontinued the use for 1 year, we conclude that it forfeited its right to continue the use. We also conclude

that the City of Norfolk Board of Adjustment (the Board) lacked authority under Neb. Rev. Stat. § 19-910 (Reissue 2012) to grant a "use" variance to otherwise allow the use to continue and that there was no "taking" of Rodehorst's property. We affirm.

II. BACKGROUND

Rodehorst applied for several building permits for its apartment building in 2010 and 2011. It applied for permits to replace the roof, fix some electrical issues, and remodel the apartments in the building. The building inspector, Steve Nordhues, granted the first two permits, but denied the third. Nordhues denied the third permit because he concluded that Rodehorst had forfeited its right to continue its nonconforming use of a fourplex in an R-2 district.

1. Appeal to the Board

Rodehorst appealed the denial of the permit to the Board. Rodehorst also asked the Board to grant it a use variance to allow it to continue operating the building as a fourplex. At a hearing on September 12, 2012, Rodehorst argued that it did not forfeit its right to continue using the building as a fourplex just because several of its apartments had been unoccupied. And Rodehorst argued that it deserved a variance to continue using the building as a fourplex because, otherwise, it would suffer an undue hardship. The City of Norfolk (the City) argued that Rodehorst had forfeited its right to continue its nonconforming use because it had been discontinued for 1 year and that the Board did not have authority to grant a use variance.

Several people, including Nordhues and a partner of Rodehorst, spoke at the hearing. The Rodehorst partner essentially argued that the property had always been a fourplex, that there were clearly four apartment units, and that its use had not changed simply because some of the apartments had been unoccupied for several years. He also explained that he had been trying to "fix it up" and that there had been work done on the building "off and on."

Nordhues spoke about his reasons for granting and denying Rodehorst's applications for building permits. He explained

that he granted the first two permits because those repairs helped "[e]nsure the health, safety and welfare of the occupants at that time." Nordhues denied the third permit, however, to remodel the four apartments "[b]ecause it was R-2 zoning and [Rodehorst] wanted it multiple use there, multifamily use."

Explaining further, Nordhues said that in his opinion, Rodehorst had forfeited its right to continue its nonconforming use as a fourplex in an R-2 district. In coming to this conclusion, Nordhues relied on § 27-50 of the City's code which provides: "In the event that a nonconforming use is discontinued, or its normal operation stopped, for a period of one year, the use of the same shall thereafter conform to the uses permitted in the district in which it is located."[1] Nordhues explained that based on power and water usage records, "at least two of the apartments hadn't been occupied, one since August 8th of 2007 and the other since April 16th of 2008." A third apartment had not been occupied since March 29, 2010. Thus, Rodehorst had discontinued its nonconforming use by not having more than two apartments occupied for more than 1 year and Rodehorst now was required to comply with the R-2 zoning designation. The Board agreed. The Board also concluded that it did not have authority to grant a use variance.

2. Appeal to the District Court

Rodehorst then appealed to the district court. Rodehorst reiterated many of the same arguments that it had made to the Board. It argued that it had not forfeited its right to continue the nonconforming use simply by failing to rent out the apartments. It emphasized that the building remained a fourplex and that its use as such continued whether the apartments were occupied or not. It further argued that even if it had forfeited its right to continue the nonconforming use, the Board erred in concluding it did not have the authority to grant a use variance. And Rodehorst made several arguments as to why the Board's ruling violated its constitutional rights. Primarily,

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[1] Norfolk Mun. Code, ch. 27, art. V, § 27-50 (2002).

Rodehorst argued that the Board's ruling was an unconstitutional taking.

The district court affirmed the Board's decision in all respects. The court determined that the Board did not have authority to grant a use variance. The court noted that the City's code defined "'variance'" as "'relief from or variation of the provisions of this chapter, **other than use regulations**, as applied to a specific piece of property, as distinct from rezoning.'" The court explained that the Board could grant variances based only on "certain physical characteristics of the actual ground or land in question," rather than the structures placed on the land.

The court also determined that Nordhues' denial of the building permit to remodel the apartments was proper. The court recounted the evidence admitted at the Board hearing; specifically, that Rodehorst had not had more than two apartments occupied in several years, that power and water usage records supported that conclusion, and that Rodehorst had not presented any evidence that "any effort had been made to rent the apartments [or] that the apartments were in a condition to be rented." The court concluded that Rodehorst had "failed to present any evidence that the property had been used as a fourplex within the past twelve months" and that Rodehorst had forfeited its right to continue the nonconforming use.

III. ASSIGNMENTS OF ERROR

Rodehorst assigns, restated, consolidated, and reordered, that the district court erred in (1) finding that Rodehorst had forfeited its right to continue the nonconforming use by not having more than two apartments occupied for several years, (2) finding that the Board did not have authority to grant a use variance, and (3) failing to find that the Board's ruling was an unconstitutional taking of Rodehorst's property.

IV. STANDARD OF REVIEW

[1] In appeals involving a decision of a board of adjustment, an appellate court reviews the decision of the district court, and irrespective of whether the district court took additional evidence, the appellate court is to decide if, in reviewing a decision of a board of adjustment, the district court abused its

discretion or made an error of law.[2] Where competent evidence supports the district court's factual findings, the appellate court will not substitute its factual findings for those of the district court.[3]

V. ANALYSIS

1. Rodehorst Forfeited Its Right to Continue Its Nonconforming Use

Rodehorst first argues that both the district court and the Board erred in determining that Rodehorst had forfeited its right to continue its nonconforming use. Rodehorst argues that although some of the apartments in the building were unoccupied for several years, the building's use as a fourplex never changed, primarily because it had all the trappings of a fourplex and the units were available for use. We conclude, however, that because only one or two of the apartments had been occupied for several years, Rodehorst "discontinued" its nonconforming use for 1 year and therefore forfeited its right to continue that use.

(a) "Discontinued" Versus "Abandoned"

We first begin with the language of the relevant statute and zoning regulation. Because the City is a city of the first class,[4] § 19-904.01 controls the regulation of nonconforming uses. It provides, in pertinent part: "If [a] nonconforming use is in fact discontinued for a period of twelve months, such right to the nonconforming use shall be forfeited and any future use of the building and premises shall conform to the regulation." Section 27-50 of the City's code, also at issue here, similarly provides: "In the event that a nonconforming use is discontinued, or its normal operation stopped, for a period of one year, the use of the same shall thereafter conform to the uses permitted in the district in which it is located."[5] As such, under

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[2] See, *Hanchera v. Board of Adjustment*, 269 Neb. 623, 694 N.W.2d 641 (2005); *Bowman v. City of York*, 240 Neb. 201, 482 N.W.2d 537 (1992).

[3] See *id.*

[4] See, Neb. Rev. Stat. § 16-101 (Reissue 2012); 2013 Nebraska Directory of Municipal Officials (2013).

[5] Norfolk Mun. Code, *supra* note 1.

these provisions, if a nonconforming use is "discontinued" for 1 year, then the user's right to continue the nonconforming use is lost.

[2] The use of the term "discontinued," as opposed to "abandoned," is important. Generally, the right to continue a nonconforming use may be lost through abandonment.[6] Abandonment requires not only a cessation of the nonconforming use, but also an intent by the user to abandon the nonconforming use.[7] But as various commentators have recognized, where a legislature or other zoning authority has used the word "discontinued," (or other similar term, such as "ceased"), instead of "abandoned," their purpose "is to do away with the need to prove intent to abandon."[8]

Yet despite this clear purpose, some courts have simply interpreted "discontinued" to be synonymous with "abandoned," and still require a showing that the user intended to abandon the nonconforming use.[9] Some courts, however, have concluded that the terms are distinct and that where a zoning regulation uses a term like "discontinued," the zoning authority need not show that a user intended to abandon the nonconforming for the right to continue that use to be lost.[10]

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[6] See, e.g., 8A Eugene McQuillin, The Law of Municipal Corporations §§ 25-200 and 25-201 (3d ed. 2012); 12 Richard R. Powell & Michael Allan Wolf, Powell on Real Property § 79C.06[3][f] (2008); 1 Kenneth H. Young, Anderson's American Law of Zoning § 6.65 (4th ed. 1996 & Cum. Supp. 2002); 83 Am. Jur. 2d *Zoning and Planning* § 611 (2013).

[7] See, 8A McQuillin, *supra* note 6, § 25-201; 12 Powell & Wolf, *supra* note 6, § 79C.06[3][f][ii]; 1 Young, *supra* note 6; 83 Am. Jur. 2d, *supra* note 6, § 612.

[8] 8A McQuillin, *supra* note 6, § 25:203 at 141. See, also, 12 Powell & Wolf, *supra* note 6, § 79C.06[3][f][iii]; 1 Young, *supra* note 6, § 6.68.

[9] See, e.g., *Dubitzky v. Liquor Control Commission*, 160 Conn. 120, 273 A.2d 876 (1970); *Board of Zoning Adjustment v. Boykin*, 265 Ala. 504, 92 So. 2d 906 (1957). See, also, 8A McQuillin, *supra* note 6, § 25:203; 12 Powell & Wolf, *supra* note 6, 79C.06[3][f][iii]; 1 Young, *supra* note 6, § 6.68; 83 Am. Jur. 2d, *supra* note 6, § 617.

[10] See, e.g., *City of Glendale v. Aldabbagh*, 189 Ariz. 140, 939 P.2d 418 (1997); *Hartley v. City of Colorado Springs*, 764 P.2d 1216 (Colo. 1988). See, also, 8A McQuillin, *supra* note 6, § 25:203; 12 Powell & Wolf, *supra* note 6, 79C.06[3][f][iii]; 1 Young, *supra* note 6, § 6.68.

For several reasons, we believe the latter approach to be the correct one. Those reasons stem mostly from our decision in *City of Lincoln v. Bruce*.[11] In that case, Billy and Betty Bruce sought to continue having a mobile home on their property even though it conflicted with the applicable zoning regulations. The Bruces challenged the constitutionality of the pertinent statute and zoning regulation. And they argued that, even if the statute and regulation were constitutional, they had a right to continue having a mobile home on the property because there was a mobile home on the property when they bought it; in other words, they had a legal, nonconforming use and a right to continue it.

[3,4] We first dismissed the constitutional challenge to the relevant statute because the Bruces did not notify the Attorney General as required by our procedural rules. We then addressed the Bruces' argument that the applicable zoning regulation was unconstitutionally vague. We stated that

> zoning laws should be given a fair and reasonable construction in light of the manifest intention of the legislative body, the objects sought to be attained, the natural import of the words used in common and accepted usage, the setting in which they are employed, and the general structure of the law as a whole.[12]

And we stated that "[w]here the provisions of a zoning ordinance are expressed in common words of everyday use, without enlargement, restriction, or definition, they are to be interpreted and enforced according to their generally accepted meaning."[13] Applying these principles to the Bruces' vagueness challenge, we found the zoning regulation to be sufficiently clear.

As for the Bruces' argument that they had a right to continue having a mobile home on their property because they had a legal, nonconforming use, we disagreed. We explained that while the Lincoln Municipal Code allowed legal, nonconforming uses to continue, it also "provided that the discontinuance

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[11] *City of Lincoln v. Bruce*, 221 Neb. 61, 375 N.W.2d 118 (1985).

[12] *Id.* at 65, 375 N.W.2d at 121.

[13] *Id.* See, also, *Thieman v. Cedar Valley Feeding Co.*, 18 Neb. App. 302, 789 N.W.2d 714 (2010).

of a nonconforming use for a period of 2 years forfeited the right to reestablish such a nonconforming use thereafter."[14] We reasoned that the Bruces had forfeited their nonconforming use because "there was no mobile home on the Bruces' property for a period of 3 years and 8 months, from May 1969 through January 1973."[15]

Several things from *Bruce* stand out. First, *Bruce* stands for the proposition that we give effect to the intent of the zoning authority, as expressed through the language of the zoning law, by giving the language its plain and ordinary meaning. As mentioned, it is well recognized that where a zoning authority uses the word "discontinued" instead of "abandoned," its purpose "is to do away with the need to prove intent to abandon."[16] That squares with the plain and ordinary meaning of the term "discontinue." Webster's dictionary defines "discontinue" as, for example, to "end the operations or existence of" and to "cease to use."[17] In other words, to discontinue is to stop. To stop something does not require an intent to abandon.

And second, *Bruce* is notable for how it applied the discontinuance provision at issue. The provision, similar to the one here, stated that "'discontinuance of a nonconforming use for a period of 2 years forfeited the right to establish such a nonconforming use thereafter.'"[18] We reasoned that the Bruces had forfeited their nonconforming use because "there was no mobile home on the Bruces' property for a period of 3 years and 8 months."[19] Significantly, we reached that conclusion without regard to whether the Bruces intended to abandon their right to continue the nonconforming use; the passage of the required 2 years was enough.

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[14] *Bruce, supra* note 11, 221 Neb. at 66, 375 N.W.2d at 122.

[15] *Id.* at 65-66, 375 N.W.2d at 122.

[16] 8A McQuillin, *supra* note 6, § 25:203 at 141. See, also, *Hartley, supra* note 10; 12 Powell & Wolf, *supra* note 6, § 79C.06[3][f][iii]; 1 Young, *supra* note 6, § 6.68.

[17] Webster's Third New International Dictionary of the English Language, Unabridged 646 (1993).

[18] *Bruce, supra* note 11, 221 Neb. at 66, 375 N.W.2d at 122.

[19] *Id.* at 65-66, 375 N.W.2d at 122.

[5,6] We also note that "[n]onconforming uses are disfavored because they reduce the effectiveness of zoning ordinances, depress property values, and contribute to the growth of urban blight."[20] Modern zoning laws generally attempt to eliminate nonconforming uses as quickly as reasonably possible.[21] This policy is best served by recognizing a distinction between a nonconforming use that has been "discontinued" and one that has been "abandoned." We hold that where a zoning law provides for the termination of a legal, nonconforming use after it has been "discontinued" for a reasonable period, there is no requirement to show intent to abandon the nonconforming use.

(b) Rodehorst "Discontinued" Its Nonconforming Use

The remaining question is whether the City met its burden to show that Rodehorst had discontinued its nonconforming use for 1 year.[22] In concluding that it had, both the Board and the district court relied heavily on evidence showing that no more than one or two of the apartments had been occupied for several years. Rodehorst argues that this was error and emphasizes that the nature and characteristics of the building (namely, that it has four separate units and accompanying features) demonstrate that its nonconforming use remained in effect.

[7] As one facet of that argument, Rodehorst argues that because the apartments were available for use, that fact, in and of itself, is sufficient. We disagree. Whether a building is *usable* as a nonconforming use does not mean that it is actually *used* in that manner.[23] To accept Rodehorst's argument otherwise would mean that, short of razing the building or the units themselves, its nonconforming use could never be considered discontinued. But nonconforming uses were

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[20] *Hartley, supra* note 10, 764 P.2d at 1224.

[21] See, e.g., 8A McQuillin, *supra* note 6, § 25-186; 12 Powell & Wolf, *supra* note 6, § 79C.06[1][a]; 83 Am. Jur. 2d, *supra* note 6, § 555.

[22] See 12 Powell & Wolf, *supra* note 6, § 79C.06[3][f][ii].

[23] See *Cizek v. Concerned Citizens of Eagle River*, 49 P.3d 228 (Alaska 2002).

never meant to exist into perpetuity.[24] We reject this portion of Rodehorst's argument.

As to the relative importance of occupancy and the characteristics of the building, our research has revealed few cases which address similar factual scenarios, i.e., where an owner is operating a multifamily dwelling as a nonconforming use (with features typical of such a dwelling), but which is less than fully occupied. Our research did reveal a short annotation in an American Law Report relatively on point. It framed the issue as "whether less than 100-percent occupancy of a multifamily dwelling unit constitutes abandonment or discontinuance of a multifamily nonconforming use."[25] Though the annotation treats "abandonment" and "discontinuance" as synonymous, its collection of cases is still helpful.

In *Parish of Jefferson v. Boyd*,[26] the Louisiana Court of Appeals held that the right to continue using a triplex in a single-family zone was lost where the building had been used as a single-family residence for 4 years. In so holding, the court relied on witnesses' testimony and utility records demonstrating that only one person resided in the building during the relevant period. The court apparently found it inconsequential that the building had three separate units (though one partition wall had been knocked down), with three kitchens and three bathrooms.[27]

Similarly, in *Pailet v. City of New Orleans, Dept. of Saf.*,[28] the Louisiana Court of Appeals held that the occupancy of a single apartment in a five-apartment building did not preserve its nonconforming use in a single- and two-family zoning district. In *Pailet*, the building owner, an elderly woman, moved out of an apartment in the building to live with her son, but

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[24] See, e.g., *Duffy v. Milder*, 896 A.2d 27 (R.I. 2006). See, also, 8A McQuillin, *supra* note 6, § 25-186; 12 Powell & Wolf, *supra* note 6, § 79C.06[1][a]; 83 Am. Jur. 2d, *supra* note 6, § 555.

[25] Annot., 40 A.L.R.4th 1012 (1985).

[26] *Parish of Jefferson v. Boyd*, 192 So. 2d 873 (La. App. 1966).

[27] See *id.*

[28] *Pailet v. City of New Orleans, Dept. of Saf.*, 433 So. 2d 1091 (La. App. 1983).

left most of her belongings at the apartment, including furniture and appliances. The evidence showed that the son stopped by the apartment several times a week to check on the apartment so as to discourage vandalism and that he stored some of his things in the garage and used some of the appliances. The court held that the building was "vacant" within the meaning of the applicable ordinance. The court also held that even if it were not considered vacant, the owner's conforming use as a single-family residence for longer than the ordinance's limitation period forfeited the right to continue the nonconforming use. These two cases, *Parish of Jefferson* and *Pailet*, seemingly focused on the degree of occupancy of the building in determining whether the right to continue the nonconforming use had been lost.

Those cases holding differently (that less than 100-percent occupancy did not forfeit the right to continue a nonconforming use), generally focused on the lack of evidence indicating an intent to abandon the nonconforming use.[29] In *Brown v. Gerhardt*,[30] the Supreme Court of Illinois addressed the use of a five-unit apartment building in a single-family zoning area. The court first concluded that discontinuance was equivalent to abandonment. The court then emphasized that "[n]o physical changes were made . . . indicating an intention to change use of the building as a multiple-housing unit" and that "[t]he mere fact that only one family occupied [the building] is not conclusive of intention to abandon it for multiple-dwelling purposes."[31]

Similarly, in *Town of East Greenwich v. Day*,[32] the Rhode Island Supreme Court addressed the use of a two-family dwelling in a single-family zoning area. There, too, the question was whether the user had abandoned the nonconforming use. The court stated that "5 years of nonuse of the dwelling for two-family occupancy was merely evidence of an intent to

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[29] See, *Brown v. Gerhardt*, 5 Ill. 2d 106, 125 N.E.2d 53 (1955); *Town of East Greenwich v. Day*, 119 R.I. 1, 375 A.2d 953 (1977).

[30] *Gerhardt, supra* note 29.

[31] *Id.* at 110, 125 N.E.2d at 56.

[32] *Town of East Greenwich, supra* note 29.

abandon," but that "[b]ecause that nonuse was unaccompanied by any overt act or failure to act indicating an intent to abandon, it was insufficient to extinguish the vested right to the nonconforming use."[33] The court agreed with the trial judge that a sewage assessment being reduced to accommodate a single family was insufficient to infer an intent to abandon, particularly where the building maintained "characteristics commonly associated with multi-family dwellings [such] as a four-car tandem driveway and separate gas and electric meters, thermostats, and kitchen and bath facilities."[34]

Based on the above cases, the degree of occupancy is the critical factor in determining whether a multifamily dwelling nonconforming use remains in effect, while the existing characteristics of the dwelling (such as separate units and features) generally go to whether the user intended to abandon the nonconforming use. As noted earlier, intent to abandon is not relevant here because the zoning laws speak in terms of discontinuance, which requires only a stoppage of the nonconforming use. Thus, the degree of occupancy of the building is the central inquiry.

Remember that our standard of review is deferential to the district court: We review its decision for abuse of discretion or an error of law, and we will not substitute our own factual findings for those of the district court.[35] Here, the court determined that utility records showed that two of the apartments had been unoccupied since 2007 and 2008. The court therefore concluded that the building had not been *used* as a fourplex for at least 12 months and that Rodehorst had lost its right to continue the nonconforming use. We find no abuse of discretion or error of law in the court's reasoning or conclusion.

We note that this is not a situation where a landlord continuously sought, but was unable to find, new tenants.[36] In other words, this was not a situation where the discontinuance

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[33] *Id.* at 6-7, 375 A.2d at 956.

[34] *Id.* at 6, 375 A.2d at 955.

[35] See *Hanchera*, *supra* note 2.

[36] See, e.g., *Flowerree v. City of Concord*, 93 N.C. App. 483, 378 S.E.2d 188 (1989).

was involuntary.[37] Rather, the district court found that "[t]here was no evidence from [Rodehorst] that any effort had been made to rent the apartments and there was no evidence that the apartments were in a condition to be rented." Moreover, there was evidence from the City showing otherwise. The City presented evidence of the building's long-term nonuse at the same time there were low vacancy rates (indicating that tenants were available). The City also presented evidence, through Nordhues, that the apartments were in disrepair when Nordhues visited the building in 2010. From this evidence, a fact finder could infer that Rodehorst had not tried to find new tenants. And "[a] discontinuance period will run where the landlord did not really try to rent the premises."[38]

2. The Board Had No Authority to Grant a "Use" Variance

Rodehorst also argues that the Board should have granted it a "use" variance to otherwise allow its nonconforming use to continue. Rodehorst argues that the district court erred in affirming the Board's conclusion that it did not have the authority to consider and grant Rodehorst such a variance. We disagree.

[8] A "use" variance is one which permits a use other than that prescribed by the particular zoning regulation.[39] An "area" variance, on the other hand, has no relationship to a change of use. It is primarily a grant to erect, alter, or use a structure for a permitted use in a manner other than that prescribed by the restrictions of the zoning ordinance.[40]

In this case, § 19-910 controls the granting of variances. Section 19-910 provides, in relevant part:

> (1) The board of adjustment shall . . . have only the following powers: . . . (c) when by reason of exceptional narrowness, shallowness, or shape of a specific piece of

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[37] See, e.g., *Smith v. Board of Adjustment*, 460 N.W.2d 854 (Iowa 1990).

[38] 8A McQuillin, *supra* note 6, § 25:203 at 146.

[39] See *Alumni Control Board v. City of Lincoln*, 179 Neb. 194, 137 N.W.2d 800 (1965).

[40] See *id.*

> property at the time of the enactment of the zoning regulations, or by reason of exceptional topographic conditions or other extraordinary and exceptional situation or condition of such piece of property, the strict application of any enacted regulation . . . would result in peculiar and exceptional practical difficulties to or exceptional and undue hardships upon the owner of such property, to authorize, upon an appeal relating to the property, a variance from such strict application so as to relieve such difficulties or hardship, if such relief may be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of any ordinance or resolution.

[9] We give statutory language its plain and ordinary meaning.[41] As evidenced by its language, and as we have held previously, § 19-910 allows a board of adjustment to grant a variance from a zoning regulation "only if strict application of the regulation, *because of the unusual physical characteristics of the property* existing at the time of the enactment," would result in exceptional practical difficulties or undue hardships to the owner.[42] Rodehorst requested a variance based on its desire to continue using its building as a fourplex, not because of any unique physical characteristic of the property. The Board, limited in its ability to grant a variance under § 19-910, did not have authority to grant Rodehorst its requested use variance.[43]

3. Application of the Zoning Regulations Did Not Constitute an Unconstitutional Taking of Rodehorst's Property

[10] Although Rodehorst makes several arguments as to why applying the zoning regulations in this manner is

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[41] See, e.g., *Lozier Corp. v. Douglas Cty. Bd. of Equal.*, 285 Neb. 705, 829 N.W.2d 652 (2013).

[42] *Barrett v. Bellevue*, 242 Neb. 548, 551, 495 N.W.2d 646, 648 (1993) (emphasis supplied) (citing *Bowman*, *supra* note 2).

[43] Cf. *Whitehead Oil Co. v. City of Lincoln*, 245 Neb. 680, 515 N.W.2d 401 (1994), *disapproved in part on other grounds*, *Scofield v. State*, 276 Neb. 215, 753 N.W.2d 345 (2008).

unconstitutional, to be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the party's brief.[44] Rodehorst assigned as error only the district court's "failure to recognize that this was an unconstitutional taking o[f] property." We therefore will address only that argument.

In most cases where courts address discontinuance provisions, they provide little guidance as to the constitutionality of those provisions. In *City of Lincoln v. Bruce*, this court simply concluded that such provisions are "generally considered a proper exercise of a municipality's power."[45] In *City of Glendale v. Aldabbagh*,[46] the Arizona Supreme Court, after holding that intent to abandon was not required under the cessation prong of a city ordinance, did not address the ordinance's constitutionality. And in *Hartley v. City of Colorado Springs*,[47] the Colorado Supreme Court, after holding that intent to abandon was not required under an ordinance similar to this one, summarily concluded that such provisions are constitutional if they specify a reasonable period for terminating the nonconforming use.

Of those courts that did address the constitutionality of discontinuance provisions, and specifically whether they worked a taking, their analysis is of little help here. In *Hinsdale v. Village of Essex Junction*,[48] the Vermont Supreme Court reasoned that zoning restrictions which "prevent the 'undue perpetuation' of preexisting, nonconforming uses are constitutionally valid," and not regulatory takings, because they substantially advance legitimate state interests. The U.S.

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[44] See, e.g., *Wulf v. Kunnath*, 285 Neb. 472, 827 N.W.2d 248 (2013).

[45] *Bruce*, *supra* note 11, 221 Neb. at 66, 375 N.W.2d at 122.

[46] *Aldabbagh*, *supra* note 10.

[47] *Hartley*, *supra* note 10.

[48] *Hinsdale v. Village of Essex Junction*, 153 Vt. 618, 626, 572 A.2d 925, 930 (1990) (referencing *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987), and *Agins v. Tiburon*, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980), *abrogated*, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005)).

Supreme Court, however, has since repudiated the "'substantially advances'" test, so that reasoning is no longer valid.[49] And although the New Hampshire Supreme Court, in *Dugas v. Town of Conway*,[50] held that a discontinuance provision worked a taking, it did so only under its state constitution, while we generally look to federal law.[51] Further, the *Dugas* court's analysis basically consisted of recognizing that there was a line between a proper exercise of the police power and an unconstitutional taking, and the court agreed with the lower court that a taking had occurred.[52]

[11] Nevertheless, we believe that discontinuance provisions may, in some cases, work a taking and that the framework for analyzing such a claim is clear. It is well settled that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[53] We analyze such claims under article I, § 21, of the Nebraska Constitution and the 5th Amendment to the U.S. Constitution, made applicable to the states through the 14th Amendment.[54] While the Nebraska Constitution provides broader protection in this area than the U.S. Constitution (compensation for damages as well as for taking), we have treated federal constitutional case law and our state constitutional case law as coterminous.[55]

As we explained in *Scofield v. State*,[56] the U.S. Supreme Court has clarified the law surrounding regulatory takings claims and provided a framework under which such claims are to be addressed. The Court has identified two types of

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[49] See *Lingle*, *supra* note 48, 544 U.S. at 545.

[50] *Dugas v. Town of Conway*, 125 N.H. 175, 480 A.2d 71 (1984).

[51] See *Scofield*, *supra* note 43.

[52] See *Dugas*, *supra* note 50.

[53] *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S. Ct. 158, 67 L. Ed. 322 (1922).

[54] See, *Lamar Co. v. City of Fremont*, 278 Neb. 485, 771 N.W.2d 894 (2009); *Scofield*, *supra* note 43.

[55] See *Scofield*, *supra* note 43.

[56] *Id.*

regulatory actions that constitute categorical or per se takings: (1) where the government requires an owner to suffer a permanent physical invasion of his property, however minor, and (2) where regulations completely deprive an owner of all economically beneficial use of his property.[57] Neither applies here. Outside these two relatively narrow categories (and the special context of land-use exactions, which this is not), regulatory takings challenges are governed by the standards set forth in *Penn Central Transp. Co. v. New York City* (*Penn Central*).[58]

[12] Under *Penn Central*, relief is possible from a regulatory taking which does not deprive the owner of all economic use of the property. The standards set forth in *Penn Central* are designed to allow careful examination and weighing of all relevant circumstances. The U.S. Supreme Court has explained that the "'[p]rimary'" *Penn Central* factors include "'"[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations."'"[59] Another relevant factor is the "'"character of the governmental action"—for instance whether it amounts to a physical invasion or instead merely affects property interests through "some public program adjusting the benefits and burdens of economic life to promote the common good."'"[60] The *Penn Central* analysis turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests.[61]

Based on the record before us, we conclude that there was no taking. Although addressing a different type of regulation, we find *Board of Zoning Appeals v. Leisz*[62] instructive. In that

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[57] See *id.* (citing *Lingle*, *supra* note 48).

[58] *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978); *Scofield*, *supra* note 43.

[59] *Scofield*, *supra* note 43, 276 Neb. at 232, 753 N.W.2d at 359 (citing *Penn Central*, *supra* note 58).

[60] *Id.* at 232-33, 753 N.W.2d at 359 (citing *Penn Central*, *supra* note 58).

[61] See *id.* (citing *Lingle*, *supra* note 48).

[62] *Board of Zoning Appeals v. Leisz*, 702 N.E.2d 1026 (Ind. 1998).

case, the City of Bloomington, Indiana, passed an ordinance limiting the number of unrelated adults who could live in a single dwelling unit. Bloomington also "enacted a grandfathering provision that permitted owners of properties that became nonconforming uses under the zoning ordinance to preserve their lawful nonconforming use status if they registered it" by a certain date.[63] The prior owners of a nonconforming dwelling (with more than three unrelated adults in each of two units) failed to register their nonconforming use and, under the new provisions, forfeited their right to continue that use. The new owners were denied the continuation of the nonconforming use. The Indiana Supreme Court held that it was not an unconstitutional taking.[64]

Although the court analyzed the takings claim, in part, under the outdated "substantially advances" test, it also analyzed the claim under the *Penn Central* framework. In addressing the economic impact of the regulation, the court noted that where a regulation is "'reasonably related to the promotion of the general welfare,'" as that one was, the U.S. Supreme Court had "'uniformly reject[ed] the proposition that diminution in property value, standing alone, [could] establish a "taking[.]"'"[65] The court also found that the regulation did not affect the owners' "reasonable investment-based expectations," because the owners were well aware of the ordinance, and that the prior owners had failed to register the nonconforming use.[66] Finally, the court noted that the character of the governmental action pointed in favor of no taking, because "[t]he registration requirement [took] nothing from the landowner," but instead "merely require[d] the filing of a form by a designated date."[67] The court noted that "[n]oncompliance with the regulation, not the regulation itself, result[ed] in the forfeiture of a vested

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[63] *Id.* at 1027.

[64] See *Leisz*, *supra* note 62.

[65] *Id.* at 1030 (citing *Penn Central*, *supra* note 58, citing *Euclid v. Ambler Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926), and *Hadacheck v. Los Angeles*, 239 U.S. 394, 36 S. Ct. 143, 60 L. Ed. 348 (1915)).

[66] *Id.*

[67] *Id.* at 1031.

property right."[68] The court thus concluded that there was no taking.

For similar reasons, we conclude that the regulation here did not work a taking on Rodehorst. The record is not clear on the economic impact of the regulation on Rodehorst. Certainly, Rodehorst will no longer be able to have four separate units in the building, but the record shows that only one or two of the units had been occupied for several years and that the unoccupied units were generally not in a state to be rented. There is also at least a suggestion that were Rodehorst to remodel the four apartments into two larger units, it might be able to earn comparable profits. But even if we were to assume that Rodehorst would lose 50 percent of the value of the property, that level of diminution in value generally does not equate to a regulatory taking under U.S. Supreme Court precedents.[69]

We also conclude that the regulation has not interfered with Rodehorst's reasonable investment-backed expectations. The record shows that Rodehorst bought the fourplex in 1987 and continued to use it as a fourplex, a legal nonconforming use, for many years. Section 19-904.01 was the law before the purchase, and the City adopted its discontinuance provision in 2002. A property owner is presumed to know the law affecting his property.[70] Rodehorst's reasonable expectation was that it could continue its nonconforming use, indefinitely, if it was not discontinued for 1 year. That expectation was met.

Finally, the character of the governmental intrusion weighs in favor of concluding there was not a taking. Though the *Penn Central* language is somewhat vague, these zoning laws seem less like a "'physical invasion'" and more like a "'"public program adjusting the benefits and burdens of economic life

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[68] *Id.*

[69] See *Penn Central*, *supra* note 58 (citing *Euclid*, *supra* note 65, and *Hadacheck*, *supra* note 65).

[70] See *Texaco, Inc. v. Short*, 454 U.S. 516, 102 S. Ct. 781, 70 L. Ed. 2d 738 (1982).

to promote the common good."'"[71] In essence, discontinuance provisions work gradually over time to eliminate nonconforming uses, a recognized good. And, as in *Leisz*, the regulation here did not outright terminate the nonconforming use, but, rather, allowed Rodehorst to continue the nonconforming use if it did not discontinue the use for 1 year. As in *Leisz*, "[t]he power to protect the property interest rest[ed] solely with the landowner."[72] For these reasons, we conclude that the discontinuance provision at issue here did not work a taking on Rodehorst.

VI. CONCLUSION

We conclude that Rodehorst discontinued its nonconforming use for 1 year and therefore forfeited its right to continue the use under the relevant zoning laws. We also conclude that the Board did not have authority to grant Rodehorst a use variance and that there was not a taking of Rodehorst's property.

AFFIRMED.

HEAVICAN, C.J., participating on briefs.

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[71] See *Scofield, supra* note 43, 276 Neb. at 232-33, 753 N.W.2d at 359 (citing *Penn Central, supra* note 58).

[72] *Leisz, supra* note 62, 702 N.E.2d at 1031.

STATE OF NEBRASKA, APPELLEE, V. ANDRE D. ROBINSON, APPELLANT.

844 N.W.2d 312

Filed March 28, 2014. No. S-13-575.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact.
3. ____: ____. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.
4. ____: ____. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland*

v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.

5. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel at trial or on direct appeal, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.
6. **Postconviction: Effectiveness of Counsel: Records: Appeal and Error.** In order to raise the issue of ineffective assistance of trial counsel where appellate counsel is different from trial counsel, a defendant must raise on direct appeal any issue of ineffective assistance of trial counsel which is known to the defendant or is apparent from the record, or the issue will be procedurally barred on postconviction review.
7. **Due Process: Trial: Confessions.** It is a violation of the Due Process Clause to use a defendant's involuntary statement against him at a criminal trial.
8. **Records: Appeal and Error.** It is incumbent upon an appellant to supply a record which supports his or her appeal.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Affirmed.

Andre D. Robinson, pro se.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

HEAVICAN, C.J.

INTRODUCTION

Andre D. Robinson was convicted of knowing or intentional child abuse resulting in death and was sentenced to life imprisonment. We affirmed his conviction and sentence.[1] Robinson then filed a petition for postconviction relief. Following an evi-

[1] *State v. Robinson*, 278 Neb. 212, 769 N.W.2d 366 (2009).

dentiary hearing, his petition was dismissed. Robinson appeals. We affirm.

BACKGROUND

Robinson was convicted of child abuse resulting in death and was sentenced to life imprisonment. The facts underlying this conviction are reported in our opinion in *State v. Robinson*.[2]

Briefly stated, the victim, Branesha Thomas, 22 months old, was brought into a hospital emergency room in Omaha, Nebraska, by her mother, Tanisha Turner, and Robinson. Turner was a girlfriend of Robinson's, but Robinson was not Branesha's father. Branesha was not breathing and had multiple bruises on her head, face, and chest. Branesha died of her injuries.

Initially, Turner reported that Branesha had fallen off her bed. Later, she informed investigators that she and Branesha had spent the day with "Eric" and had gone to the Chuck E. Cheese's and Burger King restaurants. The next day, Turner again changed her story, informing police investigators that she had actually spent the day before with a friend, while Branesha had been left with Robinson. Turner explained that she had initially lied because she did not want her mother to know that she had left Branesha with Robinson.

Robinson denied that he had caused Branesha's injuries. He indicated that Branesha had fallen off her bed, but had seemed fine. But, Robinson said, after eating at Chuck E. Cheese's, Branesha fell asleep in his car and could not be awakened. An autopsy revealed that Branesha had suffered multiple bruises, abrasions, and contusions, as well as fractured ribs and a fractured humerus bone. The pathologist testified that Branesha's injuries were caused by blunt force trauma and were inconsistent with Robinson's contention that Branesha had fallen off a bed.

During the investigation that followed Branesha's death, Robinson was interviewed by police. During the course of that interview, Robinson admitted that he had accidentally kicked Branesha.

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[2] *Id.*

Following his conviction, Robinson appealed to this court. On appeal, Robinson, represented by different counsel than at trial, assigned as error that (1) the evidence was insufficient to support his conviction, (2) the trial counsel was ineffective in failing to object to the removal of the instruction regarding the voluntariness of statements, (3) the district court erred in giving a supplemental instruction in response to a jury question, and (4) his sentence was excessive. We addressed his first, third, and fourth assignments, but declined to address the second, concluding that the record was insufficient to address an ineffective assistance of counsel claim on direct appeal.[3]

On May 6, 2011, Robinson filed a pro se petition for postconviction relief. He was appointed counsel and granted an evidentiary hearing. Counsel then filed an amended petition for postconviction relief, incorporating by reference the original petition and adding new allegations.

In his amended petition, Robinson alleges several errors on the part of the trial court and several corresponding errors relating to the ineffectiveness of trial counsel and appellate counsel. In particular, Robinson alleges that the trial court erred in (1) not holding a hearing on the voluntariness of the statements made to law enforcement on its own motion and (2) failing to instruct the jury regarding the voluntariness of the statements made to law enforcement. Robinson further alleges that his trial counsel was ineffective for failing to (1) file a motion to suppress statements made to law enforcement, (2) request a hearing on the voluntariness of statements made to law enforcement, (3) object to the removal of the voluntariness instruction, and (4) call certain witnesses that might have shown that Branesha was not in Robinson's sole custody the day of the accident.

Following a hearing, the district court dismissed his petition. Robinson, again pro se, appeals.

ASSIGNMENTS OF ERROR

On appeal, Robinson assigns that the district court erred in finding that (1) appellate counsel was not ineffective for failing

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[3] *Id.*

to raise errors of trial counsel, (2) trial counsel was not ineffective for failing to object to a jury instruction on the voluntariness of one of Robinson's statements, and (3) Robinson was procedurally barred from raising allegations of ineffectiveness of trial counsel.

STANDARD OF REVIEW

[1] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.[4]

[2-4] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact.[5] When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.[6] With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*,[7] an appellate court reviews such legal determinations independently of the lower court's decision.[8]

ANALYSIS

[5] Robinson's argument on appeal, restated and consolidated, is that the district court erred in dismissing his petition for postconviction relief. In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel at trial or on direct appeal, the defendant has the burden, in accordance with *Strickland v. Washington*,[9] to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.[10] Next, the defendant

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[4] *State v. Watkins*, 284 Neb. 742, 825 N.W.2d 403 (2012).

[5] *State v. Poe*, 284 Neb. 750, 822 N.W.2d 831 (2012).

[6] *Id.*

[7] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[8] *State v. Poe*, *supra* note 5.

[9] *Strickland v. Washington*, *supra* note 7.

[10] See *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013).

must show that counsel's deficient performance prejudiced the defense in his or her case.[11] In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.[12] The two prongs of this test, deficient performance and prejudice, may be addressed in either order.

[6] In order to raise the issue of ineffective assistance of trial counsel where appellate counsel is different from trial counsel, a defendant must raise on direct appeal any issue of ineffective assistance of trial counsel which is known to the defendant or is apparent from the record, or the issue will be procedurally barred on postconviction review.[13]

As an initial matter, we agree with both Robinson and the State that the district court erred insofar as it found that Robinson's allegations on the issues relating to the voluntariness of Robinson's statements to law enforcement were procedurally barred. Appellate counsel raised the issue of the jury instruction on direct appeal, and as such, this issue is preserved. And in his postconviction motion, Robinson alleged that appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness in not requesting a hearing on the voluntariness of Robinson's statements and also in not filing a motion to suppress those statements. We therefore turn to the merits of Robinson's claim that trial counsel was ineffective for failing to request a voluntariness hearing, for failing to file a motion to suppress his statements, and for not objecting to the lack of a jury instruction on the issue of whether Robinson's statements were voluntary.

We first turn to Robinson's arguments that counsel was ineffective for failing to request a hearing on the voluntariness of Robinson's statements and for failing to file to suppress those statements.

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[11] See *id.*

[12] *State v. Poe*, *supra* note 5.

[13] *State v. Watt*, *supra* note 10.

[7] We conclude that counsel's performance was not ineffective. It is a violation of the Due Process Clause to use a defendant's involuntary statement against him at a criminal trial.[14] And had the State offered the statements in question, the State would have had the burden to prove that they were voluntarily made.[15] But the record shows the State did not offer the statements in question into evidence, but, rather, Robinson did, because the statements were relevant to his defense that he would have said anything to law enforcement, including making a confession, in order to end the interview. In fact, the record suggests that the State believed that the statements might have been coerced and declined to offer them. Thus, a hearing on the voluntariness of the statements was unnecessary, as was the filing of a motion to suppress, and trial counsel's performance was not deficient in failing to pursue these options.

Nor was counsel ineffective for failing to object to the judge's apparent failure to instruct the jury on the voluntariness of the statements at issue. The proposed instruction that the court declined to give is not included in the record, though Robinson suggests that it is the pattern jury instruction found in the Nebraska Jury Instructions.[16] We noted in our opinion on direct appeal that for the purpose of reviewing the allegations of ineffective assistance of trial counsel, we would not presume that the pattern instruction was the instruction that the trial court declined to give.[17]

[8] But it would appear that the original proposed instruction was not preserved. It is incumbent upon an appellant to supply a record which supports his or her appeal.[18] Robinson failed to do so. As such, we have no instruction to review in order to determine whether it ought to have been given.

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[14] *State v. Seberger*, 279 Neb. 576, 779 N.W.2d 362 (2010).

[15] *State v. McClain*, 285 Neb. 537, 827 N.W.2d 814 (2013).

[16] See NJI2d Crim. 6.0.

[17] *State v. Robinson, supra* note 1.

[18] *State v. Seberger*, 284 Neb. 40, 815 N.W.2d 910 (2012).

And even if we were to assume that it was the pattern jury instruction that the court declined to give, Robinson's argument would still be without merit. The instruction provides:

> There has been evidence that defendant, (here insert name), made a statement to (a law enforcement officer, here identify person to whom statement was made). You may rely on any such statement only if you decide beyond a reasonable doubt [with regard to each statement]:
>
> (1) that the defendant made the statement; and
>
> (2) that the defendant understood what (he, she) was saying; and
>
> (3) that the statement was freely and voluntarily made under all the circumstances surrounding its making.
>
> If you decide that the state did not prove these three things beyond a reasonable doubt then you must disregard (the, that particular) statement even if you think it is true.[19]

But this instruction simply makes no sense in the context where the defendant introduced the statement precisely to show that it was involuntary, as was the case here. As such, trial counsel was not deficient in failing to object when the trial court declined to give the instruction. Nor was Robinson prejudiced by the trial court's failure to give this instruction. The district court did not err in dismissing Robinson's petition for postconviction relief.

CONCLUSION

The order of the district court dismissing Robinson's petition for postconviction relief is affirmed.

AFFIRMED.

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[19] NJI2d Crim. 6.0.

STATE OF NEBRASKA, APPELLEE, V. WESLEY S. VANDEVER, APPELLANT.

844 N.W.2d 783

Filed April 4, 2014. No. S-12-1023.

1. **Trial: Juries: Evidence: Appeal and Error.** A trial court's decision to allow a jury during deliberations to rehear or review evidence, whether such evidence is testimonial or nontestimonial, is reviewed by an appellate court for an abuse of discretion.
2. **Juries: Evidence.** Heightened procedures are required when a court considers a jury's request under Neb. Rev. Stat. § 25-1116 (Reissue 2008) to rehear testimony that was presented in the form of an audio or video recording.
3. **Evidence: Case Disapproved.** To the extent *State v. Dixon*, 259 Neb. 976, 614 N.W.2d 288 (2000), indicated that the heightened procedures set forth therein were to be used in connection with nontestimonial recorded evidence, it is disapproved.
4. **Trial: Testimony: Evidence: Words and Phrases.** "Testimony" for purposes of Neb. Rev. Stat. § 25-1116 (Reissue 2008) encompasses evidence authorized as "testimony" under Neb. Rev. Stat. § 25-1240 (Reissue 2008), that is, as live testimony at trial by oral examination or by some substitute for live testimony, including but not limited to, affidavit, deposition, or video recording of an examination conducted prior to the time of trial for use at trial.

Appeal from the District Court for Scotts Bluff County: RANDALL L. LIPPSTREU, Judge. Affirmed.

Todd D. Morten, of Island & Huff, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

HEAVICAN, C.J., CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

Wesley S. Vandever appeals his conviction in the district court for Scotts Bluff County for possession of a controlled substance, methamphetamine. Vandever claims that the court erred when, during deliberations, it granted the jury's request to rehear a recording of an investigator's interview of Vandever. We find no error and, accordingly, affirm Vandever's conviction and sentence.

STATEMENT OF FACTS

In April 2012, drug task force investigators executed a search warrant at a house in Scottsbluff, Nebraska. Four individuals, including Vandever, were inside the house at the time of the search. Investigators found Vandever and two of the others sleeping on the floor of a room in the basement. They also found bags of methamphetamine and other items, including a "meth" pipe and a marijuana pipe, located near where Vandever was sleeping. Vandever was arrested, and he was taken to the Scottsbluff Police Department where he was interviewed by one of the investigators who had conducted the search.

The investigator who interviewed Vandever testified at trial regarding the search and the interview. In connection with the investigator's testimony, the court admitted into evidence a compact disc containing an edited audio recording of the interview. Vandever did not object to admission of the recording, and the recording, which was approximately 8 minutes in length, was played for the jury. In the recorded interview, the investigator questioned Vandever regarding, inter alia, ownership of items found near him in the basement room. Vandever admitted that the marijuana pipe was his but denied that the "meth" pipe and the bags of methamphetamine were his. The investigator then asked Vandever, "Did you use last night? . . . Did you smoke a little?" Vandever replied, "Not a lot. Because obviously I was sleeping." Vandever continued that he generally did not use a lot and that he was working on getting clean.

During deliberations, the jury sent a written note to the court stating, "Can we please listen to the 8 minute . . . interview again?" The note was signed by the presiding juror. The court wrote a response on the note stating, "I will allow to hear Exh 16 (C.D of the interview) only one more time." After the judge's signature, it stated, "P.S The bailiff will be present during the playing of the C.D. Do not resume your discussions until you return to jury room." In a journal entry, the court stated that it had "honored the jury's written request to rehear Exhibit 16 ([the investigator's] interview of [Vandever]) over Defense Counsel's objection."

The jury thereafter returned a verdict finding Vandever guilty of possession of methamphetamine. The court later sentenced Vandever to imprisonment for 300 days and payment of a $100 fine.

Vandever appeals his conviction.

ASSIGNMENT OF ERROR

Vandever claims that the court erred when it failed to hold a hearing to determine the purpose of the jury's request, failed to make explicit findings, and allowed the jury to rehear the recording of the interview.

STANDARD OF REVIEW

[1] In cases involving testimonial evidence, we have stated that the decision to allow a jury to review or rehear evidence during deliberations is a matter within the trial court's discretion. *State v. Halsey*, 232 Neb. 658, 441 N.W.2d 877 (1989). In cases involving nontestimonial evidence, we have stated that trial courts have broad discretion in allowing the jury unlimited access to properly received exhibits that constitute substantive evidence. *State v. Pischel*, 277 Neb. 412, 762 N.W.2d 595 (2009). Therefore, a trial court's decision to allow a jury during deliberations to rehear or review evidence, whether such evidence is testimonial or nontestimonial, is reviewed by an appellate court for an abuse of discretion.

ANALYSIS

Vandever claims that the court erred when it allowed the jury to rehear the recording of the investigator's interview of Vandever during the jury's deliberations without adhering to the heightened procedures set forth in *State v. Dixon*, 259 Neb. 976, 614 N.W.2d 288 (2000), *disapproved on other grounds, State v. Smith*, 284 Neb. 636, 822 N.W.2d 401 (2012) (*Dixon*). Vandever specifically contends that the recording was testimonial evidence and that under the heightened procedures described in *Dixon*, when the jury seeks to rehear testimonial evidence, the court is required to conduct a hearing, make findings regarding the reason for the jury's request, and weigh the probative value of replaying the recording against the

danger of undue emphasis, before it can properly grant the jury's request to rehear the recording.

As to the legal principles under consideration, the State argues in response that our reasoning in *Dixon* was flawed and that we should overrule *Dixon*. The State contends that the recording at issue in *Dixon*—a recording of a conversation between the defendant and a codefendant in which the defendant admitted to the crime charged—was not testimonial evidence but was instead substantive evidence of the crime and that therefore, the heightened procedures we espoused in *Dixon* for testimonial evidence were not applicable to the nontestimonial evidence in *Dixon*. As to the present case, the State argues that the recording at issue was substantive evidence not subject to the heightened procedures in *Dixon* and that therefore, it was consistent with the district court's authority to permit exhibits into the jury room to allow the jury to rehear the recording during deliberations. According to the State, we need only review the district court's ruling for an abuse of discretion.

Decision in Dixon.

In view of the parties' contentions, we begin by examining our decision in *Dixon* to determine whether and to what extent it may be in need of clarification. Later in this opinion, we describe in greater detail our understanding of what constitutes "testimony," sometimes referred to as "testimonial evidence." As we explain later, testimony refers to trial evidence, including live oral examinations, affidavits and depositions in lieu of live testimony, and tapes of examinations conducted prior to the time of trial for use at trial in accordance with procedures provided by law. See, generally, Neb. Rev. Stat. §§ 25-1240 and 25-1242 (Reissue 2008).

In *Dixon*, the defendant objected to the jury's request during deliberations for a tape player that would allow the jury to listen to a recording of a telephone conversation between the defendant and a codefendant. In the conversation, the defendant was asked why he shot the victim and the defendant replied that he "'just felt like blasting on him.'" *Id.* at 980, 614 N.W.2d at 292. The trial court overruled the defendant's

objection, and the jury was provided the recording and a tape player for unsupervised use in the jury room. Although we reversed the defendant's convictions and resolved the appeal on other grounds, we considered the defendant's assignment of error regarding the jury's access to the recording during deliberations in order "to address the procedure by which such exhibits should be presented to the jury if properly admitted into evidence." *Id.* at 986, 614 N.W.2d at 296.

In *Dixon*, we stated that "[t]he general rule is that allowing a jury to rehear only portions of the evidence after they have commenced deliberations is not to be encouraged, but it is a matter within the discretion of the trial court." 259 Neb. at 986-87, 614 N.W.2d at 296 (citing *State v. Halsey*, 232 Neb. 658, 441 N.W.2d 877 (1989)). We then stated that specifically, with regard to testimonial evidence, "[t]he traditional common-law rule is that a trial court has 'no discretion to submit depositions and other testimonial materials to the jury room for *unsupervised review*, even if properly admitted into evidence at trial.'" *Id.* at 987, 614 N.W.2d at 296 (quoting *Chambers v. State*, 726 P.2d 1269 (Wyo. 1986)). That is, such testimonial material should not be permitted in the jury room. However, in *Dixon*, we created heightened procedures by which testimonial evidence could be reheard by the jury during deliberations and described these heightened procedures as follows:

> When a jury makes a request to rehear certain evidence, the common-law rule requires that a trial court discover the exact nature of the jury's difficulty, isolate the precise testimony which can solve it, and weigh the probative value of the testimony against the danger of undue emphasis. If, after this careful exercise of discretion, the court decides to allow some repetition of the tape-recorded evidence for the jury, it can do so in open court in the presence of the parties or their counsel or under other strictly controlled procedures of which the parties have been notified.

259 Neb. at 987, 614 N.W.2d at 297. In *Dixon*, we stated that these procedures were required by common law and cited *Chambers* for this proposition. Vandever asserts that the

recording at issue in the instant case is testimonial and that the court was required but failed to follow these heightened procedures before it allowed the jury to rehear the interview recording of Vandever.

We make two initial observations about this portion of the *Dixon* opinion that are relevant to our consideration of whether *Dixon* remains sound and whether it applies to the instant case. First, in the Wyoming case to which we refer as the source for the heightened procedures, the Wyoming Supreme Court described such procedures as being required by statute rather than by common law. See *Chambers*, *supra*. Second, although the heightened procedures were meant to apply specifically to "depositions and other testimonial materials," see *id.* at 1275, our discussion of the procedures in *Dixon* infers that such procedures apply generally to any recorded form of verbal evidence. Both observations require further explanation.

In *Dixon*, we stated that the heightened procedures set forth therein were required by "the common-law rule" and we cited *Chambers*, *supra*, as the source for the procedures. 259 Neb. at 987, 614 N.W.2d at 296. However, the Wyoming Supreme Court in *Chambers* did not state that the procedures were derived from common law. Instead, in the context of determining whether it was appropriate for a court to allow the jury to view videotaped testimony during deliberations, the court in *Chambers* discussed a Wyoming statute which "permits a court to refresh the jury's recollection of trial testimony under certain limited circumstances." 726 P.2d at 1275-76. The Wyoming court quoted the statute, which provides:

> After the jurors have retired for deliberation, if there is a disagreement between them as to any part of the testimony, or if they desire to be informed as to any part of the law arising in the case, they may request the officer to conduct them to the court where information upon the matter of law shall be given. The court may give its recollection as to the testimony on the points in dispute, in the presence of or after notice to the parties or their counsel.

Wyo. Stat. Ann. § 1-11-209 (2013). The Wyoming court in *Chambers* identified the statute, rather than a common-law rule, as the source requiring the heightened procedures to be employed when a court responds to a jury's request during deliberations to rehear testimony that was presented in the form of an audio or video recording.

[2] We note that Nebraska has a similar statute, Neb. Rev. Stat. § 25-1116 (Reissue 2008), which provides as follows:

> After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed as to any part of the law arising in the case, they may request the officer to conduct them to the court where the information upon the point of law shall be given, and the court may give its recollection as to the testimony on the point in dispute in the presence of or after notice to the parties or their counsel.

To the extent the heightened procedures we set forth in *Dixon* were based on the Wyoming court's interpretation of its statute relating to the court's ability to refresh the jury's memory with regard to recorded testimony, then it was reasonable for this court in *Dixon* to similarly interpret § 25-1116 as also requiring such heightened procedures when a jury makes a request to rehear testimony that was presented through an audio or video recording. However, because our comments in *Dixon* relied on *Chambers v. State*, 726 P.2d 1269 (Wyo. 1986), it was not appropriate in *Dixon* to indicate that the heightened procedures were required under common law and to cite to *Chambers* as authority therefor. Instead, we should have stated that the heightened procedures were implicitly required under statute when the court considers a jury's request under § 25-1116 to rehear testimony that was presented in the form of an audio or video recording.

We next note that although the Wyoming case, *Chambers, supra*, was specifically concerned with whether the jury could rehear recorded testimony, our discussion of the heightened procedures in *Dixon* was more expansive and made it appear that the procedures outlined in *Dixon* applied to any sort of verbal recording entered into evidence, whether or not that

evidence was testimonial. As discussed above, the heightened procedures set forth in *Dixon* are a reasonable interpretation of how § 25-1116 should be applied when the jury's request relates to recorded testimony. Because the statute is concerned with testimony, the heightened procedures outlined in *Dixon* should apply only when the recording at issue contains testimonial evidence. The heightened procedures should not apply to nontestimonial evidence merely because such evidence is verbal in nature and is contained in an audio or video recording.

In case law subsequent to *Dixon*, we have noted a distinction between testimonial evidence and other types of evidence. For example, in *State v. Pischel*, 277 Neb. 412, 427, 762 N.W.2d 595, 607 (2009), we stated both that "a trial court has no discretion to submit testimonial materials to the jury for unsupervised review during deliberations" and that "trial courts have broad discretion in allowing the jury to have unlimited access to properly received exhibits that constitute substantive evidence of the defendant's guilt." In *Pischel*, we rejected the defendant's argument that the heightened procedures in *Dixon* applied to the district court's decision to allow the jury access during deliberations to transcripts of the defendant's online conversations with a minor girl in a prosecution for use of a computer to entice a child or a peace officer believed to be a child for sexual purposes. We reasoned in *Pischel* that "the transcripts of online conversations were not testimonial material but instead were substantive evidence of [the defendant's] guilt." 277 Neb. at 427-28, 762 N.W.2d at 607. We note in this regard that the Wyoming Supreme Court has similarly made a distinction between testimonial recordings and recordings admitted as nontestimonial exhibits when applying *Chambers*, *supra*. See *Munoz v. State*, 849 P.2d 1299 (Wyo. 1993).

This distinction between testimonial materials and other evidence was not made clear in *Dixon*, because we referred simply to "recordings" rather than "recordings of testimony." The distinction was blurred further because the evidence at issue in *Dixon* was not testimonial. Instead, the evidence was a recording of the defendant's conversation with a codefendant

which the defendant did not know was being recorded and did not know would be used at a trial. Therefore, the heightened procedures applicable to evidence embodied in a recording of testimony outlined in *Dixon* were not applicable to the evidence at issue in that case.

[3] As noted above, the defendant's convictions in *Dixon* were reversed based on issues unrelated to the recording that was played for the jury. Therefore, the discussion of the heightened procedures in *Dixon* did not determine the disposition of the case but instead was intended to provide guidance to the trial court on remand. However, as we noted above, the discussion of the heightened procedures in conjunction with the discussion of specific evidence at issue in *Dixon* unintentionally implied that the procedures were to be used in connection with any evidence that is presented in the form of an audio or video recording, whether testimonial or not. To the extent *Dixon* indicated that the heightened procedures set forth therein were to be used in connection with nontestimonial recorded evidence, it is disapproved. The procedures set forth in *Dixon* implementing § 25-1116 are applicable only when a jury has requested to have its memory refreshed regarding testimonial evidence.

Parties' Contentions and Our Resolution.

As we understand it, Vandever argues that the jury's request was implicitly subject to § 25-1116, the recording was testimonial evidence, and the court erred when it failed to strictly adhere to the heightened procedures described in *Dixon*. The State argues in response that the recording was substantive evidence of the crime, nontestimonial in nature, and that the court had discretion to allow the jury unlimited access to the recording and to rehear it without being required to follow the heightened procedures set forth in *Dixon*. We determine that the evidence at issue in this case was not testimony and that therefore, the jury's request was not made pursuant to § 25-1116 and the heightened procedures were not required.

We note initially that the determination of whether evidence is "testimony" for purposes of § 25-1116 is not the same

as the determination of whether a statement is "testimonial" for purposes of Confrontation Clause analysis. See *State v. Hembertt*, 269 Neb. 840, 850, 696 N.W.2d 473, 481-82 (2005) (stating that "whether particular evidence is 'testimonial,' for Confrontation Clause purposes, may be quite different from whether it is 'testimonial' as that word is used in other contexts" and citing *Dixon* as an example of such other contexts). Therefore, our analysis of whether evidence is "testimony" for purposes of § 25-1116 is not guided by, and should not serve as guidance for, an analysis of whether a statement is "testimonial" for Confrontation Clause purposes.

As discussed above, the heightened procedures set forth in *Dixon* are required only when the jury has made a request with regard to testimony pursuant to § 25-1116. Section 25-1116 is found in the Nebraska statutes pertaining to civil procedure. "Testimony" as used in § 25-1116 is not defined. We therefore must explain the meaning of "testimony" in § 25-1116 and determine whether the recording at issue in this case was "testimony" within the meaning of § 25-1116. Although we have not explicitly set forth a definition of "testimony" for purposes of § 25-1116, we have applied the statute with respect to the reading of a deposition during deliberations, see *Bakhit v. Thomsen*, 193 Neb. 133, 225 N.W.2d 860 (1975), as well as the reading of an official court reporter's record of live testimony, see *Shiers v. Cowgill*, 157 Neb. 265, 59 N.W.2d 407 (1953), and *Graves v. Bednar*, 171 Neb. 499, 107 N.W.2d 12 (1960).

[4] Elsewhere in the statutory chapter pertaining to civil procedure, we note that § 25-1240 provides that the "testimony of witnesses may be taken in four modes: (1) By affidavit; (2) by deposition; (3) by oral examination, and (4) by videotape of an examination conducted prior to the time of trial for use at trial in accordance with procedures provided by law." We read "testimony" under § 25-1240 as including oral testimony as well as verbal evidence presented in other modes as a substitute for oral testimony. We take guidance from § 25-1240, and we determine that "testimony" for purposes of § 25-1116 encompasses evidence authorized as "testimony" under § 25-1240, that is, as live testimony at trial by oral

examination or by some substitute for live testimony, including but not limited to, affidavit, deposition, or video recording of an examination conducted prior to the time of trial for use at trial. For completeness, we note that videotaped depositions are statutorily included in the definition of "deposition" in § 25-1242.

In the present case, the recording of the investigator's interview of Vandever, although verbal in nature, was not prepared as or admitted into evidence as a substitute for live testimony at trial. In the language of § 25-1240, it was not "an examination conducted prior to the time of trial for use at trial in accordance with procedures provided by law." Instead, we determine that the interview was admitted as nontestimonial evidence. Therefore, the jury's request to rehear the 8-minute investigator interview recording was not a request relating to "testimony" made pursuant to § 25-1116, and the heightened procedures set forth in *Dixon* were not required. As a consequence, we need not comment on whether the procedure followed by the district court was or was not adequate under the heightened procedures. The court did not abuse its discretion when it did not follow heightened procedures before allowing the jury to rehear the recording, and we therefore find Vandever's assignment of error to be without merit.

CONCLUSION

We determine that the evidence at issue in this case was not testimony and that therefore, the heightened procedures for a jury request for "any part of the testimony" pursuant to § 25-1116 were not required. We conclude that the district court did not abuse its discretion when it allowed the jury to rehear the 8-minute recording of the investigator's interview of Vandever. We therefore reject Vandever's assignment of error, and we affirm his conviction and sentence.

AFFIRMED.

WRIGHT, J., participating on briefs.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. THOMAS G. SUNDVOLD, RESPONDENT.

844 N.W.2d 771

Filed April 4, 2014. No. S-13-002.

1. **Disciplinary Proceedings.** A proceeding to discipline an attorney is a trial de novo on the record.
2. **Disciplinary Proceedings: Appeal and Error.** In an attorney discipline case, the Nebraska Supreme Court reaches its conclusion independent of the findings of the referee. However, where the credible evidence is in conflict on a material issue of fact, the Nebraska Supreme Court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Disciplinary Proceedings: Proof.** Violation of a disciplinary rule concerning the practice of law is a ground for discipline, and disciplinary charges against an attorney must be established by clear and convincing evidence.
4. **Disciplinary Proceedings.** In attorney discipline cases, the basic issues are whether discipline should be imposed and, if so, the type of discipline under the circumstances.
5. ____. The Nebraska Supreme Court evaluates each attorney discipline case in light of its particular facts and circumstances and considers the attorney's acts both underlying the events of the case and throughout the proceeding.
6. ____. The goal of attorney disciplinary proceedings is not as much punishment as determination of whether it is in the public interest to allow an attorney to keep practicing law.
7. ____. To determine whether and to what extent discipline should be imposed in an attorney discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
8. **Disciplinary Proceedings: Words and Phrases.** In the context of attorney discipline proceedings, misappropriation is an unauthorized use of client funds entrusted to an attorney, including not only stealing, but also unauthorized temporary use for the attorney's own purpose, whether or not the attorney derives personal gain therefrom.
9. **Disciplinary Proceedings.** Misappropriation of client funds is one of the most serious violations of duty an attorney owes to clients, the public, and the courts.
10. ____. Misappropriation by an attorney violates basic notions of honesty and endangers public confidence in the legal profession.
11. ____. Absent mitigating circumstances, disbarment is the appropriate discipline in cases of misappropriation or commingling of client funds.
12. ____. The fact a client did not suffer any financial loss does not excuse an attorney's misappropriation of client funds and does not provide a reason for imposing a less severe sanction.

13. ____. The Nebraska Supreme Court does not view the misappropriation of funds from one's own firm as any less dishonest and deceptive than the misappropriation of client funds.
14. ____. In determining the appropriate discipline of an attorney, the Nebraska Supreme Court considers the discipline imposed in cases presenting similar circumstances.
15. ____. Cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions.
16. ____. In evaluating attorney discipline cases, the Nebraska Supreme Court considers aggravating and mitigating circumstances.

Original action. Judgment of suspension.

Kent L. Frobish, Assistant Counsel for Discipline, for relator.

Clarence E. Mock, of Johnson & Mock, for respondent.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

PER CURIAM.

NATURE OF CASE

The Counsel for Discipline of the Nebraska Supreme Court, relator, filed amended formal charges against Thomas G. Sundvold, respondent, alleging that he violated his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 2012), and several of the Nebraska Rules of Professional Conduct. Respondent filed an answer admitting certain factual allegations but denying other certain factual allegations and denying that he violated the rules of professional conduct. This court appointed a referee. After holding an evidentiary hearing, the referee filed a report and determined that respondent had violated Neb. Ct. R. of Prof. Cond. §§ 3-501.1 (competence); 3-501.3 (diligence); 3-501.4(a) and (b) (communications); 3-501.15(a) and (c) (safekeeping property); and 3-508.4(a), (c), and (d) (misconduct); and his oath of office as an attorney. The referee recommended that respondent be suspended for a period of 3 years, followed by 2 years' monitored probation. Respondent filed exceptions to the referee's report regarding findings of fact and conclusions of law and the recommended discipline. In his brief to this court, respondent states that he

withdraws his exceptions to the referee's findings of fact and conclusions of law and takes exception only to the referee's recommended discipline. Relator agrees with the referee's recommended discipline. We determine that the proper sanction is suspension from the practice of law for a period of 3 years and, upon reinstatement, 2 years of probation, including monitoring.

STATEMENT OF FACTS

Respondent was admitted to the practice of law in Nebraska in September 2003. At all relevant times, respondent was engaged in the private practice of law in Lincoln, Nebraska, under the jurisdiction of the Committee on Inquiry of the First Disciplinary District, which determined reasonable grounds existed to discipline respondent. Accordingly, formal charges were filed against respondent on January 3, 2013, and amended formal charges were filed on February 15.

The amended formal charges contained two counts against respondent. Count I generally alleged that respondent, while employed by a law firm, failed to properly represent a client, a roofing contractor, in a civil suit brought against the client; failed to deposit advance fees from the client in the law firm's trust account; and failed to turn over attorney fees received from the client to the law firm in accordance with an oral agreement with the law firm. Count II generally alleged that respondent failed to deliver payments that he received from three additional clients to the law firm in accordance with an oral agreement with the law firm.

Respondent filed his answer on March 15, 2013, in which he admitted certain factual allegations and denied other factual allegations and denied that he violated the rules of professional conduct. Given respondent's answer, this court appointed a referee on March 25.

On June 11, 2013, an evidentiary hearing was held before the referee. On September 10, the referee filed his report. The referee found facts substantially as described below. Following our review of the record, we determine there is clear and convincing evidence in the record to support these facts.

Respondent graduated from Creighton University School of Law in May 2002. During law school, respondent served as a member of the Creighton Law Review and worked as a law clerk for an Omaha law firm. As a law clerk, respondent's duties were confined to legal research and brief writing.

Respondent's first employer after law school was an insurance company, where he worked as a cargo claims attorney starting in May 2003. Respondent essentially worked as an insurance adjuster negotiating claims. He did not participate in any litigation, nor did he draft any pleadings.

In 2006, respondent accepted employment with a carrier company as an associate general counsel handling bodily injury claims. His duties primarily involved adjusting claims for bodily injury. While employed there, respondent was not involved in any courtroom litigation or the drafting of pleadings.

In August 2010, respondent left the carrier company to engage in the private practice of law. Up to that time, respondent did not have any experience in the financial aspects of the attorney-client relationship. He had never negotiated a fee, handled client funds, or drafted a contract for the provision of legal services, nor had he ever worked with a billing system or utilized a trust account.

In late September or early October 2010, respondent joined a law firm as an associate attorney. Respondent was an employee with the law firm as an associate attorney from October 2010 through December 12, 2011.

Respondent's compensation was based upon an oral agreement with the law firm. Respondent was to receive a percentage of the gross amount of fees paid by his clients to the law firm. Under this agreement, 60 percent of the gross amount was to go to respondent and 40 percent was to go to the law firm. Respondent was obligated to deliver to the law firm all fee payments received by him from his clients, with the exception that he was to be allowed to retain fees generated from relatives and close friends for certain legal work. In exchange, the law firm supplied respondent with an office, billing services, and some limited secretarial assistance. The

law firm also orally agreed to cover his expenses, including, but not limited to, bar dues, seminar fees, organization dues, and marketing expenses.

Although respondent was an associate at the law firm, he practiced independently, essentially sharing office space with no direct supervision by the law firm. Because respondent operated largely on his own under this agreement, the law firm did not provide him with formal training or oversight related to the handling of client funds or billing.

On or about February 7, 2011, respondent entered into a fee agreement with a client and the client's roofing company for representation of the client, a roofing contractor, in a civil action that had been filed against the client's company in the county court for Seward County. The suit involved a roofing contract between the plaintiff and the client's company for work to be done on the plaintiff's residence, and the plaintiff was seeking $7,291.16 in damages. The fee agreement between respondent and the client was for an hourly fee of $175, with a $1,000 advance fee payment required before representation would commence. Respondent received the $1,000 advance fee payment on or about February 7.

The advance fee payment received by respondent from the client should have been deposited in the law firm's trust account for the benefit of the client. Respondent did not deposit the advance fee payment into the law firm's trust account, nor did he inform the law firm that he had received the advance fee payment from the client. Respondent deposited the advance fee payment into his personal account.

On or about February 7, 2011, when respondent entered into the fee agreement with the client, respondent learned that a hearing had been set in the client's case for March 21 at 11 a.m., by which time the client was to have an answer filed. On March 21 at 11 a.m., the plaintiff's counsel appeared in court, but respondent did not appear on behalf of his client, and no answer had been filed. The court set the case for trial to be held on May 2. At 11:44 a.m. on March 21, respondent filed by fax to the court an answer on behalf of the client. A copy of the March 21 journal entry was sent to respondent informing him that the trial was set for May 2.

Between March 21 and April 25, 2011, respondent spoke with the client about the claim against the client, but respondent did not conduct any formal discovery. On April 25, respondent and the plaintiff's attorney had a telephone conversation regarding a continuance of the approaching May 2 trial date. Respondent and the plaintiff's counsel have different recollections about this conversation. The plaintiff's attorney testified by way of an affidavit which was received in evidence at the hearing before the referee. The plaintiff's attorney testified that respondent had stated that he was not ready for trial and that he intended to file a motion to continue the trial. The plaintiff's attorney testified in his affidavit that he informed respondent that the plaintiff would object to a continuance and that therefore, respondent should not state in his motion that the plaintiff's attorney had agreed to any requested continuance.

In contrast, respondent testified that the plaintiff's attorney did not have any objection to the proposed continuance but that he did not know at the time whether the plaintiff would consent to a continuance. Respondent testified that he understood that the plaintiff's attorney agreed to advise him before trial if an objection would be lodged against respondent's motion to continue. Respondent testified that based on this understanding, respondent informed his client that the trial was continued and that the client was excused from appearing on May 2.

On April 28, 2011, respondent filed a motion to continue the trial. Respondent did not verify that the trial had been continued; nevertheless, he informed his client that the client did not need to be in court on May 2. Respondent testified at the hearing before the referee that since he did not hear from the plaintiff's attorney before trial, he assumed the trial would be continued with a new date set by the court.

Respondent did not appear in court for the trial on May 2, 2011. Several attempts were made by court personnel to contact respondent on the morning of May 2, but those attempts were unsuccessful. On May 2, the court denied respondent's motion to continue the trial and the trial commenced. The plaintiff put on evidence and testified. The court then entered judgment in the full amount of the plaintiff's prayer of $7,291.16.

Notice of the judgment was mailed to respondent. Respondent did not send a copy of the judgment to his client, but respondent informed the client by telephone of the judgment that had been entered against him. On May 6, 2011, respondent filed a motion to set aside default judgment, and on May 9, a hearing on the motion was set for June 17.

On or about May 12, 2011, the client received a copy of the judgment from the court. The client called respondent, and respondent told the client that he was taking care of the matter. On May 17, the client sent a fee payment of $500 to respondent, and on June 13, the client sent another fee payment of $500 to respondent. Respondent did not deliver these payments to the law firm but instead kept the money. Respondent did not inform the law firm that he had received the payments.

A hearing was held on respondent's motion to set aside default judgment on June 17, 2011. The court determined that judgment was not by default but instead was entered after an evidentiary hearing. On June 20, the court entered a journal entry overruling respondent's motion, and the journal entry was mailed to respondent. Respondent did not inform his client that the motion was overruled, and he did not send a copy of the journal entry to the client.

On August 9, 2011, the plaintiff's attorney filed a motion for order in aid of execution, requesting that respondent's client be ordered to appear in court on September 9 to answer questions regarding the assets of the client's company. An order for a debtor's examination was issued, and the order was served on the client on August 19. Shortly after August 19, the client called respondent to ask about the September 9 debtor's examination. Respondent informed the client that he did not need to appear for the hearing.

Respondent did not appear in court on September 9, 2011, and he did not file an objection or other pleading on behalf of the client regarding the debtor's examination. Based on respondent's advice, the client did not appear in court for the debtor's examination. On September 9, the court made a journal entry regarding the client's failure to appear for the debtor's examination. The court issued an arrest warrant for

the client and set a cash bond of $1,000. A copy of the journal entry was mailed to respondent; however, respondent did not send a copy to the client and did not notify the client of the entry of the arrest warrant.

On October 5, 2011, the client was arrested in McCook, Nebraska, based on the warrant issued in Seward County. The client posted the $1,000 cash bond and was released. He was ordered to appear in court on October 14, and on that date, the client and respondent appeared in court for the debtor's examination. On October 18, respondent filed a motion to withdraw as counsel for the client, and the motion was granted the following day.

With respect to a second client, on or about January 21, 2011, respondent received a payment from the second client in the amount of $400. Respondent failed to deliver the payment to the law firm or to notify the law firm that he had received the payment. Respondent kept the $400.

On or about April 13, 2011, respondent received a payment from a third client in the amount of $500. Again, respondent failed to deliver the payment to the law firm or to inform the law firm that he had received the payment. Respondent kept the $500 payment.

During the time respondent was employed by the law firm, he represented a fourth client. Respondent received various payments from the fourth client, most of which respondent delivered to the law firm. However, on five occasions, respondent failed to deliver payments from the fourth client to the law firm or to notify the law firm that he had received the payments. The following payments totaling $1,170 were given to respondent by the fourth client but were not delivered to the law firm: a $300 payment on December 17, 2010; a $750 payment on April 29, 2011; a $40 payment on May 6; a $40 payment on May 31; and a $40 payment on July 25. Respondent kept the $1,170.

On December 14, 2011, relator received a letter from respondent addressed to "The Nebraska Bar Association . . . RE: Self Disclosure." The letter stated in part, "I [respondent] am writing in regards to a matter which I wanted to share with the Nebraska Bar Association to ensure proper self

disclosure has been made to the Bar Association and to ensure all proper steps were taken and accounted for." Respondent's letter addressed two of the allegations which were later contained in the amended formal charges. First, he disclosed his failure to deposit the advance fee from the roofing contractor client in the law firm's trust account and instead depositing the fee in his personal account. Second, respondent disclosed his reasons for not depositing the advance fee in the law firm's trust account. Respondent did not disclose that he failed to deliver the payments received from the three other clients as described above. He also did not disclose the facts and circumstances involving his representation of the roofing contractor client, which led to the judgment's being entered against the client and the client's arrest.

The referee determined that respondent made three false statements in his letter. First, the referee determined that respondent made false statements with regard to the law firm's failing to pay respondent certain out-of-pocket expenses, namely respondent's 2010 Nebraska and Iowa bar dues. Respondent did not join the law firm until October 2010, and at that time, his 2010 Nebraska and Iowa bar dues had been paid. Second, the referee determined that respondent made false statements in his letter regarding his relationship with the roofing contractor client. Respondent stated in his letter that since he was an acquaintance of the client, he was not required to deliver the fee to the law firm. The referee determined that respondent was not an acquaintance of the client and that this statement was accordingly false. Third, the referee determined that respondent made false statements regarding the fee arrangement he entered into with the roofing contractor client. In the letter, respondent stated that he had a flat fee agreement with the client, but he had actually agreed to represent the client on an hourly basis with an advance payment of $1,000.

Respondent testified at the hearing before the referee that the law firm had failed to pay his out-of-pocket expenses as promised under the oral agreement between respondent and the law firm. Respondent testified that he made repeated requests to the law firm to pay his out-of-pocket expenses

and that he also requested, and the law firm failed to provide him with, an accounting showing how fees paid to him were calculated. Respondent testified that in order to offset amounts owed to him by the law firm under the employment agreement, he retained client fees he received from December 2010 through July 2011.

The referee determined that respondent misappropriated $4,070 of client fees due the law firm over a 7-month period starting on or about December 17, 2010, and ending on or about July 25, 2011. The referee further determined that of the $4,070 of client fees respondent misappropriated from the law firm, he has paid the law firm $2,000, and that this payment was made to the law firm's trust account by respondent only after the roofing contractor client made a demand on him and the law firm for the $2,000 which had been paid to respondent. The referee also determined that respondent had misappropriated client fees due to the law firm at a point in time when the law firm did not owe him money for bar dues.

The referee determined that by his actions, respondent violated conduct rules §§ 3-501.1; 3-501.3; 3-501.4(a) and (b); 3-501.15(a) and (c); and 3-508.4(a), (c), and (d); and his oath of office as an attorney. The referee recommended that respondent be suspended for a period of 3 years, followed by 2 years' monitored probation.

On September 19, 2013, respondent filed exceptions to the referee's report regarding findings of fact and conclusions of law and the recommended discipline. Respondent stated in his brief to this court filed October 10, 2013, that he "withdraws exceptions 1-4 to the Referee's report" regarding the referee report's findings of fact and conclusions of law, but that he still takes exception to the referee's recommended discipline.

ASSIGNMENTS OF ERROR

Having withdrawn his exceptions to the referee's findings of fact and conclusions of law, respondent generally states that he takes exception to the referee's recommended discipline. Respondent specifically states he takes exception to these discipline decisions and quotes from the referee's report: (1) "'The public needs to be protected from respondent engaging

in the conduct found herein to be in violation of Nebraska Court Rules of Professional Conduct and in violation of the Oath of Office found herein in the future,'" and (2) "'[t]he appropriate discipline is a 3 year suspension of respondent's license to practice law and that respondent be able to apply for reinstatement in accordance with the Nebraska Supreme Court Rules of Discipline, which application shall include a showing which demonstrates his fitness to practice law.'"

STANDARDS OF REVIEW

[1,2] A proceeding to discipline an attorney is a trial de novo on the record. *State ex rel. Counsel for Dis. v. Tonderum*, 286 Neb. 942, 840 N.W.2d 487 (2013). We reach our conclusion independent of the findings of the referee. *State ex rel. Counsel for Dis. v. Ellis*, 283 Neb. 329, 808 N.W.2d 634 (2012). However, where the credible evidence is in conflict on a material issue of fact, we consider and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another. *Id*.

ANALYSIS

[3-5] Violation of a disciplinary rule concerning the practice of law is a ground for discipline, and disciplinary charges against an attorney must be established by clear and convincing evidence. *Ellis, supra*. In attorney discipline cases, the basic issues are whether discipline should be imposed and, if so, the type of discipline under the circumstances. *State ex rel. Counsel for Dis. v. Simon, ante* p. 78, 841 N.W.2d 199 (2013). We evaluate each attorney discipline case in light of its particular facts and circumstances and consider the attorney's acts both underlying the events of the case and throughout the proceeding. *Ellis, supra*.

In his report, the referee made findings of fact and determined that respondent violated his oath of office as an attorney as provided by § 7-104 and the following provisions of the Nebraska Rules of Professional Conduct: §§ 3-501.1; 3-501.3; 3-501.4(a) and (b); 3-501.15(a) and (c); and 3-508.4(a), (c), and (d). Upon our review of the record, we agree that there is clear and convincing evidence that

by his conduct, respondent violated his oath of office as an attorney and the provisions of the professional conduct rules set forth above. As stated above, in his brief before this court, respondent states that he withdraws his exceptions to the referee report's findings of fact and conclusions of law, and that he only takes exception to the referee's recommended discipline. Therefore, the only issue before us is the appropriate discipline.

[6,7] The goal of attorney disciplinary proceedings is not as much punishment as determination of whether it is in the public interest to allow an attorney to keep practicing law. *Ellis, supra*. Neb. Ct. R. § 3-304 provides:

> (A) Misconduct shall be grounds for:
>
> (1) Disbarment by the Court; or
>
> (2) Suspension by the Court; or
>
> (3) Probation by the Court in lieu of or subsequent to suspension, on such terms as the Court may designate; or
>
> (4) Censure, and reprimand by the Court; or
>
> (5) Temporary suspension by the Court; or
>
> (6) Private reprimand by the Committee on Inquiry or Disciplinary Review Board.
>
> (B) The Court may, in its discretion, impose one or more of the disciplinary sanctions set forth above.

To determine whether and to what extent discipline should be imposed in an attorney discipline proceeding, we consider the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *State ex rel. Counsel for Dis. v. Tonderum*, 286 Neb. 942, 840 N.W.2d 487 (2013).

[8-13] We have previously stated that in the context of attorney discipline proceedings, misappropriation is an unauthorized use of client funds entrusted to an attorney, including not only stealing, but also unauthorized temporary use for the attorney's own purpose, whether or not the attorney derives personal gain therefrom. *State ex rel. Counsel for Dis. v. Crawford*, 285 Neb. 321, 827 N.W.2d 214 (2013).

Misappropriation of client funds is one of the most serious violations of duty an attorney owes to clients, the public, and the courts. *Id*. Misappropriation by an attorney violates basic notions of honesty and endangers public confidence in the legal profession. *Id*. Absent mitigating circumstances, disbarment is the appropriate discipline in cases of misappropriation or commingling of client funds. *Id*. The fact a client did not suffer any financial loss does not excuse an attorney's misappropriation of client funds and does not provide a reason for imposing a less severe sanction. *Id*. We do not view the misappropriation of funds from one's own firm as any less dishonest and deceptive than the misappropriation of client funds. *State ex rel. Counsel for Dis. v. Achola*, 266 Neb. 808, 669 N.W.2d 649 (2003).

[14] In determining the appropriate discipline of an attorney, we consider the discipline imposed in cases presenting similar circumstances. *Tonderum, supra*. In the referee's report, he relied on three cases from this court regarding an attorney's misappropriation of funds from a law firm: *State ex rel. Counsel for Dis. v. Frederiksen*, 262 Neb. 562, 635 N.W.2d 427 (2001); *Achola, supra*; and *State ex rel. Counsel for Dis. v. Young*, 285 Neb. 31, 824 N.W.2d 745 (2013).

In *Frederiksen*, the only alleged misconduct against Mark D. Frederiksen was the misappropriation of funds by him from a law firm of which he was a partner. Frederiksen apparently became dissatisfied with his compensation, and over a period of 3 years, he misappropriated approximately $15,000 in fees paid directly to him by his law firm's clients. We ordered that Frederiksen be suspended from the practice of law for a period of 3 years.

In *Achola*, like in *Frederiksen*, the only alleged misconduct against George B. Achola was the misappropriation of funds by him from a law firm of which he was an associate. Achola wrote unauthorized checks on his law firm's account totaling more than $20,000 for the payment of his personal expenses. In *Achola*, we stated that sufficient mitigating factors existed to support the decision not to disbar Achola, and we ordered that Achola be suspended from the practice of law for a period of 3 years.

In *Young*, formal charges were filed against David James Young alleging, inter alia, that Young had failed to deliver payments that he had received from a client to the law firm of which he was an associate totaling $1,500. Young filed a conditional admission, and we ordered that Young be suspended from the practice of law for a period of 20 months followed by 2 years' monitored probation upon reinstatement.

Respondent argues that *Frederiksen*, *Achola*, and *Young* are not completely relevant to the instant case, because it is not evident in those cases that the attorneys were misappropriating client funds as a self-help remedy to offset amounts owed to them by their respective law firms, as respondent asserts he was doing in this case. We do not find this argument to be persuasive. Respondent never informed the law firm that he had received the payments from the clients or that he intended to keep the payments as a means to offset the amount the law firm purportedly owed to him. Respondent was misappropriating the payments owed to the law firm and failed to inform the law firm that he was doing so. Respondent's conduct is similar to that of the attorneys in *Frederiksen*, *Achola*, and *Young*.

Respondent further contends that his failure to deposit the $1,000 advance fee payment from the roofing client into his law firm's trust account or the respondent's own trust account is an isolated incident of failure to deposit unearned fees into a client trust account. Respondent explains that his conduct was due to the fact that he did not have any previous experience handling advance fee payments. Accordingly, respondent asserts that he should receive a lesser sanction.

[15] While respondent's failure to deposit the advance fee payment received from the roofing client into a trust account is the only example in the record of respondent's misappropriating unearned advance fees, the record indicates several other instances where respondent misappropriated fee payments for services that he received from clients. Specifically, the record shows that respondent misappropriated clients' fees 10 times over a period of 7 months totaling $4,070. We have stated that cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying

more serious sanctions. *State ex rel. Counsel for Dis. v. Ellis*, 283 Neb. 329, 808 N.W.2d 634 (2012). Respondent admits that he failed to deliver these payments to the law firm and failed to notify the law firm that he had received these payments. Respondent further admits that he wrongfully resorted to "self-help" by failing to deliver the fees to the law firm, but he explained that his conduct was due to the fact that he believed the law firm owed him money based on their oral compensation agreement.

[16] We have stated that in evaluating attorney discipline cases, we consider aggravating and mitigating circumstances. *Ellis, supra*. In his report, the referee noted mitigating factors to be considered in determining respondent's sanction. The record contained no evidence that respondent was not in good standing with the Nebraska State Bar Association, and there are no prior disciplinary complaints or penalties against respondent. The record showed that respondent has accepted responsibility for what happened, and he cooperated throughout the course of the disciplinary proceedings. The record contains a letter of support from one attorney describing respondent's professionalism and high moral character. Respondent has contributed to the profession through his membership in various organizations, and he has been an active member in the community.

The referee also noted the following aggravating factors in his report. In his "Self Disclosure" letter, respondent disclosed that he deposited the advance fee from the roofing client in his personal account instead of in the law firm's trust account. However, respondent failed to disclose in his letter that he had failed to deposit payments he received from the second, third, and fourth clients and failed to notify the law firm that he had received these payments. He also failed to disclose the facts and circumstances of his representation of the roofing client which led to a judgment's being entered against the client. The referee stated that respondent's representation of the roofing client raises questions as to whether respondent is competent to practice law. The record indicates that the misappropriation of client funds was not an isolated incident and that over a period of 7 months, respondent misappropriated

clients' fees 10 different times totaling $4,070. Furthermore, the referee stated that although it is not clear from the record what the outcome of the roofing client's case would have been if respondent had properly represented the client, the client experienced a financial loss due to respondent's conduct, because he was required to post a $1,000 cash bond as a result of respondent's advising the client he did not have to appear at the debtor's examination. We consider the foregoing mitigating and aggravating factors in determining the sanction to be imposed.

Given the mishandling of his representation of the roofing client's case, his failure to deposit the advanced fee of $1,000 received from the roofing client into a trust account, and his misappropriation of client funds totaling $4,070, we consider respondent's conduct to be serious violations of the rules governing attorney conduct. We, therefore, order that respondent be suspended from the practice of law for a period of 3 years and, upon reinstatement, be subject to 2 years of probation, including monitoring. The monitoring shall be by an attorney licensed to practice law in the State of Nebraska, who shall be approved by the relator. The monitoring plan shall include, but not be limited to, the following: During the first 6 months of the probation, respondent will meet with and provide the monitor a weekly list of cases for which respondent is currently responsible, which list shall include the date the attorney-client relationship began; the general type of case; the date of last contact with the client; the last type and date of work completed on the file (pleading, correspondence, document preparation, discovery, or court hearing); the next type of work and date that work should be completed on the case; any applicable statutes of limitations and their dates; and the financial terms of the relationship (hourly, contingency, et cetera). After the first 6 months through the end of probation, respondent shall meet with the monitor on a monthly basis and provide the monitor with a list containing the same information as set forth above; respondent shall reconcile his trust account within 10 days of receipt of the monthly bank statement and provide the monitor with a copy within 5 days; and respondent shall submit a quarterly compliance report with

the Counsel for Discipline, demonstrating that respondent is adhering to the foregoing terms of probation. The quarterly report shall include a certification by the monitor that the monitor has reviewed the report and that respondent continues to abide by the terms of the probation.

CONCLUSION

We find that respondent should be and hereby is suspended from the practice of law for a period of 3 years. Should respondent apply for reinstatement, his reinstatement shall be conditioned upon respondent's being on probation for a period of 2 years, including monitoring following reinstatement, subject to the terms of probation outlined above. Respondent is also directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and Neb. Ct. R. §§ 3-310(P) (rev. 2014) and 3-323 within 60 days after an order imposing costs and expenses, if any, is entered by this court.

JUDGMENT OF SUSPENSION.

WILLIAM D. COFFEY, APPELLANT, V. PLANET GROUP, INC., APPELLEE.

845 N.W.2d 255

Filed April 4, 2014. No. S-13-194.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.
2. ____: ____. An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.
3. **Statutes: Judgments: Appeal and Error.** The interpretation of statutes and regulations presents questions of law. An appellate court independently reviews questions of law decided by a lower court.
4. **Statutes: Appeal and Error.** Absent a statutory indication to the contrary, an appellate court gives words in a statute their ordinary meaning.

5. **Statutes: Legislature: Intent: Appeal and Error.** An appellate court will not look beyond a statute to determine the legislative intent when the words are plain, direct, or unambiguous.
6. **Contracts: Wages.** Neb. Rev. Stat. § 48-1229(4) (Reissue 2010) allows an employer and employee to contractually agree to define when a commission becomes earned as a wage.
7. **Contracts.** When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as an ordinary or reasonable person would understand them.
8. **Contracts: Parties.** The implied covenant of good faith and fair dealing exists in every contract and requires that none of the parties to the contract do anything which will injure the right of another party to receive the benefit of the contract.
9. ____: ____. The nature and extent of an implied covenant of good faith and fair dealing are measured in a particular contract by the justifiable expectations of the parties. Where one party acts arbitrarily, capriciously, or unreasonably, that conduct exceeds the justifiable expectations of the second party.
10. ____: ____. A violation of the covenant of good faith and fair dealing occurs only when a party violates, nullifies, or significantly impairs any benefit of the contract.
11. **Contracts.** The scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract.
12. **Termination of Employment.** Unless constitutionally, statutorily, or contractually prohibited, an employer, without incurring liability, may terminate an at-will employee at any time with or without reason.
13. **Termination of Employment: Public Policy: Damages.** Under the public policy exception to the at-will employment doctrine, an employee can claim damages for wrongful discharge when the motivation for the firing contravenes public policy.
14. **Termination of Employment: Public Policy.** The public policy exception to the at-will employment doctrine is restricted to cases when a clear mandate of public policy has been violated, and it should be limited to manageable and clear standards.
15. ____: ____. In determining whether a clear mandate of public policy is violated, courts should inquire whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme.
16. **Termination of Employment: Wages: Public Policy.** The Nebraska Wage Payment and Collection Act, Neb. Rev. Stat. §§ 48-1228 to 48-1232 (Reissue 2010), does not represent a very clear mandate of public policy which would warrant recognition of an exception to the employment-at-will doctrine.

Appeal from the District Court for Douglas County: SHELLY R. STRATMAN, Judge. Affirmed.

Theodore R. Boecker, Jr., of Boecker Law, P.C., L.L.O., for appellant.

Julie Schultz Self, Heather Voegele-Andersen, and Kristin M.V. Farwell, of Koley Jessen, P.C., L.L.O., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and CASSEL, JJ.

MCCORMACK, J.

NATURE OF CASE

William D. Coffey seeks commissions for two projects that he worked on that were ongoing at the time of his termination as a salesperson from Planet Group, Inc. Planet Group argues that under the 2008 Sales Compensation Plan (Compensation Plan) signed by Coffey, commissions are earned only when the sales contract is signed during employment. The prominent issue presented by this appeal is whether the Compensation Plan is void under Neb. Rev. Stat. § 48-1229(4) (Reissue 2010) of the Nebraska Wage Payment and Collection Act (Wage Act). We find that the 2007 legislative amendments to § 48-1229(4) allow an employer and employee to contractually define when a commission becomes payable. We affirm the district court's order granting partial summary judgment, because the commissions for the two projects are not payable to Coffey under the Compensation Plan.

BACKGROUND

In 2007, Coffey was hired as a salesperson at Planet Group. His role was to bolster international sales and assist in selling "enterprise solutions" to prospective customers. As a part of his employment, Coffey signed the Compensation Plan. The plan set out the requirements for when a commission was earned and how it would be paid. In its relevant parts, it stated:

> Commission Payment:
>
> Commissions are paid at the end of the month following the month that contracts were approved, executed and received by Planet Group and down payments are received. . . .
>
> 75% of Commissions are paid upon signed contract, and the final 25% upon contract completion. . . . The

> upfront commission portion is not fully "earned" until each contract is completed.
>
> . . . .
>
> Termination
>
> A Participant who is terminated or resigns from employment with Planet Group the commission payments will cease. . . . Commissions are deemed "earned" when a contract has been signed by the customer and the down payment under the contract has been received.

On March 26, 2009, Coffey's employment was terminated by Planet Group as part of Planet Group's reduction in force. Coffey was terminated with over 20 other employees.

At the time of his termination, Coffey had four relevant projects he had been working on: (1) the "First Data, US, Recurring Payments project" (Recurring Billing Project); (2) the "First Data, Argentina, B-24 Services project" (Posnet Project); (3) the "TIVIT project" (TIVIT Project); and (4) the "Mexico SSP project" (Mexico SSP Project). According to Coffey's affidavit, these projects either were orally agreed to, had been given approval by the customer, or were in the process of obtaining formal approval. Coffey admits that the Compensation Plan applied to the Recurring Billing Project, the Posnet Project, and the Mexico SSP Project. The TIVIT Project, however, had its own compensation plan.

For the 2 days prior to his termination, Coffey had been in negotiations with representatives from "First Data" on the Recurring Billing Project. According to Coffey, he and the representatives agreed that the project would be completed in two phases. The first phase's contract was executed on March 26, 2009, and the charges were billed. The second phase's contract was deferred until after the completion of the first phase to address any issues that may have occurred during the first phase. Coffey received commission for the first phase, but Planet Group denied him commission for the second phase.

Coffey attested that for the Posnet Project, he had completed his role as a salesperson, and that he is owed a commission. Coffey argued that the only work to be completed was the execution of new work orders for the remaining

phases of the project, which were to be executed after the initial phase.

In his amended complaint, Coffey alleged that he was owed commissions on each of the four projects. He alleged that for each project, there were "orders on file." He further alleged that Planet Group terminated him in bad faith, which he claims was a breach of the implied covenant of good faith and fair dealing.

The district court partially sustained Planet Group's motion for summary judgment. It granted the motion for summary judgment on Coffey's bad faith claim, because it found that Planet Group had the right to terminate Coffey as an at-will employee and that there was no evidence to support the existence of a public policy violation.

The district court also granted summary judgment on the Recurring Billing Project, the Posnet Project, and the Mexico SSP Project. The district court found that the Compensation Plan required a signed contract prior to a commission's being paid. The district court found that all commissions had properly been paid on these three projects. It further found that the signed contract requirement did not contradict the Wage Act's definition of wages under § 48-1229(4).

After a jury trial on the TIVIT Project claim, Coffey was awarded $100,933 for commission owed to him. After trial, the district court denied Coffey's motion to alter or amend regarding the earlier order granting Planet Group's motion for summary judgment. Coffey now appeals.

ASSIGNMENTS OF ERROR

Coffey assigns that the district court erred in (1) sustaining the motion for summary judgment as to the claim for payments on the Recurring Billing Project, (2) sustaining the motion for summary judgment as to additional payments owed on the Posnet Project, (3) sustaining the motion for summary judgment as to the claim of a breach of the implied covenant of good faith and fair dealing, (4) determining that there can be no claim for a breach of the covenant of good faith and fair dealing under Nebraska law, (5) defining "orders on file" as an executed contract rather than submitting

the issue to the jury, (6) partially sustaining the motion for summary judgment, and (7) denying the motion to alter or amend the judgment.

STANDARD OF REVIEW

[1] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.[1]

[2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.[2]

[3] The interpretation of statutes and regulations presents questions of law.[3] We independently review questions of law decided by a lower court.[4]

ANALYSIS

Wage Act

The crux of Coffey's argument on appeal is that § 48-1229(4) of the Wage Act does not permit an employer and an employee to contractually define when a commission becomes payable as "wages." Coffey argues that, therefore, he is owed a commission for both the Recurring Billing Project and the Posnet Project, because both projects constitute "orders on file" as contemplated under § 48-1229(4).

We have previously stated that an employer and an employee cannot circumvent the statutory definition of wages through an employment agreement, because the Wage Act controlled the determination of what commissions were payable.[5] At the

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[1] *Peterson v. Homesite Indemnity Co.*, *ante* p. 48, 840 N.W.2d 885 (2013).

[2] *Id.*

[3] *Carey v. City of Hastings*, *ante* p. 1, 840 N.W.2d 868 (2013).

[4] *Id.*

[5] *Moore v. Eggers Consulting Co.*, 252 Neb. 396, 562 N.W.2d 534 (1997).

time, the Wage Act required that a commission became payable if it was an order on file at the time of the employee's termination.[6] However, these holdings were based on a version of § 48-1229(4) not in effect today.

The Wage Act was modified in response to our decision in *Roseland v. Strategic Staff Mgmt.*[7] In *Roseland*, we held that under the language of § 48-1229(4) (Reissue 1998) of the Wage Act, vacation leave provided by an employer was a fringe benefit and a wage payable to an employee upon termination. In doing so, we found that the employment agreement's provision stating that the unused vacation leave was not payable upon separation was null and void because it contradicted the Wage Act. After *Roseland*, the Legislature amended § 48-1229(4) in 2007.[8] The new amended version states in full:

> Wages means compensation for labor or services rendered by an employee, including fringe benefits, when previously agreed to and conditions stipulated have been met by the employee, whether the amount is determined on a time, task, fee, commission, or other basis. Paid leave, other than earned but unused vacation leave, provided as a fringe benefit by the employer shall not be included in the wages due and payable at the time of separation, unless the employer and the employee or the employer and the collective-bargaining representative have specifically agreed otherwise. Unless the employer and employee have specifically agreed otherwise through a contract effective at the commencement of employment or at least ninety days prior to separation, whichever is later, wages includes commissions on all orders delivered and all orders on file with the employer at the time of separation of employment less any orders returned or canceled at the time suit is filed.[9]

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[6] *Id.*

[7] *Roseland v. Strategic Staff Mgmt.*, 272 Neb. 434, 722 N.W.2d 499 (2006).

[8] See 2007 Neb. Laws, L.B. 255 (now codified at Neb. Rev. Stat. § 48-1229(4) (Reissue 2010)).

[9] § 48-1229(4) (Reissue 2010).

Not only did the Legislature add language to fringe benefits and unused vacation leave, but it also added a new clause preceding the sentence explaining when commissions become payable. This is our first opportunity to interpret the new amendments in terms of when a commission becomes payable.

[4,5] Our rules of statutory interpretation guide our analysis. Absent a statutory indication to the contrary, we give words in a statute their ordinary meaning.[10] We will not look beyond a statute to determine the legislative intent when the words are plain, direct, or unambiguous.[11] So, we first consider the plain language of the statute.

[6] We find that the plain meaning of "[u]nless the employer and employee have specifically agreed otherwise through a contract effective at the commencement of employment or at least ninety days prior to separation" is that an employer and employee can contractually agree to define when a commission becomes earned as a wage. This clause qualifies the definition of when a commission becomes payable. Thus, absent a contractual agreement stating the contrary, a commission is payable at the time of the employee's termination if the order is delivered or if the order is on file. However, the 2007 amendment to § 48-1229(4) now allows an employer and employee to contractually define when a commission becomes "wages" via provisions in a signed employment agreement. The district court did not err in determining the parties could contractually define when a commission becomes earned and payable under the Wage Act.

[7] We must now determine if Coffey and Planet Group contractually defined when a commission was earned. When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as an ordinary or reasonable person would understand them.[12] The Compensation Plan states:

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[10] *Fisher v. PayFlex Systems USA*, 285 Neb. 808, 829 N.W.2d 703 (2013).

[11] *Id.*

[12] *RSUI Indemnity Co. v. Bacon*, 282 Neb. 436, 810 N.W.2d 666 (2011).

"A Participant who is terminated or resigns from employment with Planet Group the commission payments will cease. . . . Commissions are deemed 'earned' when a contract has been signed by the customer and the down payment under the contract has been received." The Compensation Plan, signed by Coffey more than 90 days prior to his termination, requires that Coffey be employed when the contract is signed and when the downpayment is received to earn his commission. Therefore, we find that the district court did not err in determining that a commission was earned by Coffey only if there was a signed contract and a downpayment had been received for such contract. We must now determine whether the evidence, viewed in the light most favorable to Coffey, established that there are no genuine issues of material fact that there was not a signed contract for either the Recurring Billing Project or the Posnet Project.

We find that Coffey has been paid all earned commissions for the Recurring Billing Project. The evidence presented establishes that the Recurring Billing Project was to be completed in two phases: a requirements-analysis phase and a second phase which involved the purchase of the software system for the recurring billing contract. The second contract, for which Coffey now seeks a commission, was not entered into at the time he was terminated. Coffey has conceded so in his brief. Coffey's supervisor at Planet Group, whose deposition testimony was offered by Coffey, testified that the second contract was not signed until August 2009, after Coffey was terminated. Additionally, it is also clear from the "Requirements Analysis" contract that the second contract was a separate and distinct contract, not yet entered into. The "Requirements Analysis" contract contains language referencing "a proposed, larger project" that could be entered into if the "[c]ustomer moves forward with the purchase of the software system."

Likewise, the evidence viewed in a light most favorable to Coffey establishes that Coffey has been paid all commissions for each Posnet Project contract signed during his employment. Coffey admits that he has been paid for all Posnet Project contracts signed during his employment. In

his appellate brief, Coffey has conceded that additional payments for the Posnet Project were made only after a "[c]hange [o]rder" had been signed on June 4, 2009. Coffey conceded that the change order extended the project end date and discussed additional payments to be made. Coffey also conceded that the revenue, from which he seeks a commission, was secured by Planet Group through change orders signed after his termination. From this evidence, there are no genuine issues of material fact that the commission Coffey now seeks for the Posnet Project was from a contract signed after his termination.

We find that there are no genuine issues of material fact that Coffey was no longer employed with Planet Group when the additional Recurring Billing Project and Posnet Project contracts were signed. Therefore, we affirm the grant of partial summary judgment in favor of Planet Group on the commissions arising from the Posnet Project.

Good Faith and Fair Dealing

Coffey argues that the district court erred in concluding that there is no claim for breach of good faith because employees are terminable at will under Nebraska law. He argues that an employee can be terminated on an at-will basis and still have a good faith and fair dealing claim if the employer wrongfully acts to defeat the employee's reasonable expectations. We disagree.

[8-11] The implied covenant of good faith and fair dealing exists in every contract and requires that none of the parties to the contract do anything which will injure the right of another party to receive the benefit of the contract.[13] The nature and extent of an implied covenant of good faith and fair dealing are measured in a particular contract by the justifiable expectations of the parties.[14] Where one party acts arbitrarily, capriciously, or unreasonably, that conduct exceeds the justifiable expectations of the second party.[15] A violation of the covenant

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[13] *Id.*

[14] *Id.*

[15] *Id.*

of good faith and fair dealing occurs only when a party violates, nullifies, or significantly impairs any benefit of the contract.[16] The scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract.[17]

Here, the contract between Coffey and Planet Group was the Compensation Plan signed by both parties as part of Coffey's employment. In his amended complaint, Coffey alleged that Planet Group terminated his employment in bad faith to avoid paying Coffey additional commissions under the Wage Act.

[12-15] Unless constitutionally, statutorily, or contractually prohibited, an employer, without incurring liability, may terminate an at-will employee at any time with or without reason.[18] We recognize, however, a public policy exception to the at-will employment doctrine.[19] Under the public policy exception, an employee can claim damages for wrongful discharge when the motivation for the firing contravenes public policy.[20] The public policy exception is restricted to cases when a clear mandate of public policy has been violated, and it should be limited to manageable and clear standards.[21] In determining whether a clear mandate of public policy is violated, courts should inquire whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme.[22]

[16] We have previously determined that the Wage Act did not "'represent a "very clear mandate of public policy" which would warrant recognition of an exception to the employment-at-will doctrine.'"[23] The Wage Act does not prohibit employers from discharging employees, and it does not provide

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[16] *Id.*

[17] *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003).

[18] *Trosper v. Bag 'N Save*, 273 Neb. 855, 734 N.W.2d 704 (2007).

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.* at 858, 734 N.W.2d at 707.

employees with any substantive rights.[24] Thus, while the Wage Act provides Coffey with a remedy to collect any compensation which Planet Group may owe him, it does not "declare '"an important public policy with such clarity as to provide a basis for a civil action for wrongful discharge."'"[25]

Additionally, we find Planet Group did not act in bad faith in denying the commissions to Coffey under the Compensation Plan. A violation of the covenant of good faith and fair dealing occurs only when a party violates, nullifies, or significantly impairs any benefit of the contract.[26] We have already established that under the clear and unambiguous terms of the Compensation Plan, a commission can be earned only if the contract is signed while the employee is employed with the company. Under the Compensation Plan, Planet Group has upheld its requirements and has paid Coffey the proper benefits of the contract.

We conclude, as a matter of law, that Coffey cannot raise a bad faith claim based on his termination as an at-will employee with Planet Group, because there is no evidence of a public policy violation. Coffey's only avenue for recovery in this case was his breach of contract claims he raised in relation to the four projects. Therefore, the district court did not err in determining that Planet Group had the right to terminate Coffey's employment and in determining as a matter of law that Planet Group could not have acted in bad faith in doing so.

CONCLUSION

For the reasons stated herein, we affirm the judgment of the district court.

AFFIRMED.

MILLER-LERMAN, J., not participating.

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[24] *Id.*

[25] *Id.* at 874, 734 N.W.2d at 717 (Stephan, J., dissenting).

[26] *RSUI Indemnity Co. v. Bacon*, *supra* note 12.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL L. JURANEK, APPELLANT.

844 N.W.2d 791

Filed April 4, 2014. No. S-13-542.

1. **Motions to Suppress: Confessions: Constitutional Law: Miranda Rights: Appeal and Error.** In reviewing a motion to suppress a confession based on the claimed involuntariness of the statement, including claims that it was procured in violation of the safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), an appellate court applies a two-part standard of review. With regard to historical facts, the appellate court reviews the trial court's findings for clear error. Whether those facts suffice to meet the constitutional standards, however, is a question of law, which the appellate court reviews independently of the trial court's determination.
2. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence.
3. **Constitutional Law: Miranda Rights: Self-Incrimination.** *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), prohibits the use of statements derived during custodial interrogation unless the prosecution demonstrates the use of procedural safeguards that are effective to secure the privilege against self-incrimination.
4. **Miranda Rights: Self-Incrimination.** *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), requires law enforcement to give a particular set of warnings to a person in custody before interrogation: that he has the right to remain silent, that any statement he makes may be used as evidence against him, and that he has the right to an attorney, either retained or appointed.
5. **Miranda Rights: Police Officers and Sheriffs: Words and Phrases.** For purposes of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), interrogation refers not only to express questioning, but also to any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect.
6. **Constitutional Law: Miranda Rights: Arrests: Words and Phrases.** A person is in custody for purposes of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), when there is a formal arrest or a restraint on one's freedom of movement to the degree associated with such an arrest.
7. **Miranda Rights.** *Miranda* protections apply only when a person is both in custody and subject to interrogation.
8. **Miranda Rights: Police Officers and Sheriffs.** An individual is in custody for purposes of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), when handcuffed and placed in the back seat of a police cruiser.

9. **Confessions.** Statements that are spontaneously volunteered by the accused are not the result of interrogation and are admissible.
10. **Miranda Rights: Police Officers and Sheriffs: Words and Phrases.** The definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response.
11. **Constitutional Law: Self-Incrimination.** The Fifth Amendment privilege against self-incrimination is fundamental to the United States' system of constitutional rule.
12. **Confessions.** Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his or her free choice.
13. **Trial: Evidence: Appeal and Error.** The improper admission of evidence is a trial error and subject to harmless error review.
14. **Verdicts: Juries: Appeal and Error.** Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.
15. **Trial: Evidence: Appeal and Error.** Erroneous admission of evidence is harmless error and does not require reversal if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Kelly M. Steenbock for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

WRIGHT, J.

I. NATURE OF CASE

Michael L. Juranek unsuccessfully moved to suppress his statements made to police during the investigation of the stabbing of Jimmy McBride. At his trial for first degree murder and use of a deadly weapon to commit a felony, the district court admitted evidence of the statements over Juranek's objections. Juranek now challenges the district court's decision not to suppress the statements and also raises sufficiency of the

evidence as to his convictions for first degree murder and use of a deadly weapon to commit a felony. We find no error in the admission of two of Juranek's statements and harmless error in the admission of the third. Ultimately, we conclude that there was sufficient evidence to find Juranek guilty, and we affirm his convictions and sentences.

II. SCOPE OF REVIEW

[1] In reviewing a motion to suppress a confession based on the claimed involuntariness of the statement, including claims that it was procured in violation of the safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), an appellate court applies a two-part standard of review. With regard to historical facts, we review the trial court's findings for clear error. Whether those facts suffice to meet the constitutional standards, however, is a question of law, which we review independently of the trial court's determination. *State v. Bormann*, 279 Neb. 320, 777 N.W.2d 829 (2010).

[2] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. *State v. McGuire*, 286 Neb. 494, 837 N.W.2d 767 (2013).

III. FACTS

On September 14, 2011, Officer Brandon Braun of the Omaha Police Department responded to a 911 emergency dispatch service call concerning a "cutting" or stabbing. Upon arriving at the scene, Braun located "a male subject that [had] blood on his shirt." The subject, whom Braun recognized as McBride, mentioned the name "Mike" and pointed to a male about 100 feet away who was wearing a dark shirt and carrying a dark-colored bag. Because Braun was the only officer

at the scene at that time, he relayed the description to other officers who could attempt to detain the suspect. McBride later died from his wound.

En route to the scene of the stabbing, Officer Aaron Andersen of the Omaha Police Department saw an individual matching the description relayed by Braun. The individual was later identified as Juranek. Andersen, whose police cruiser window was rolled down, pulled up to Juranek and yelled, "'Hey.'" Andersen did not pull in front of Juranek or order him to stop. Juranek turned around, and Andersen observed that Juranek was "bleeding from [one of] his eye[s]." Without exiting the cruiser, Andersen asked Juranek what had happened to his eye. Juranek responded, "He threatened me so I stuck him." At that point, Andersen exited the cruiser, handcuffed Juranek, and placed him in the cruiser.

While Andersen drove Juranek to the scene of the stabbing, Andersen heard Juranek "making several statements to himself." Specifically, Andersen heard Juranek say that "he stuck him once," "he wanted to stick him again," and "he wanted to kill him." Andersen had not asked any questions of Juranek or engaged him in conversation.

After informing the officers at the scene of the stabbing that he had detained Juranek, Andersen drove Juranek to the police station and took him to an interview room. Shortly thereafter, a detective with the Omaha Police Department began to interview Juranek. The video recording from the interview shows that the detective started the interview by attempting to shake Juranek's hand, which Juranek declined because his hands were "dirty." The following dialog then took place:

> Detective: Okay, sir. I'm, uh, was speaking with the officer that brought you down here and he shared some information, so—
>
> Juranek: I told it to him 14 times.
>
> Detective: Ok. Do you want to tell it to me?
>
> Juranek: The asshole's name was Jimmy McBride. He threatened to kill me. I took a knife, and I stuck him. I would have stuck him again, but he ran away. And after that I don't know what happened. He hand—, I was a

> block away and he handcuffed me and wanted to know where the knife was. I don't even, after I stabbed that piece of shit, I don't remember anything. I'm guilty.
>
> Detective: [after about 10 seconds of silence] Um. I want to read you these six statements here with yes or no questions, okay?

The detective then read Juranek the *Miranda* warnings. After Juranek waived his *Miranda* rights, the detective thoroughly interviewed Juranek about McBride and the stabbing.

Juranek was charged by complaint with first degree murder and use of a deadly weapon to commit a felony. The county court determined there was probable cause for the complaint and bound Juranek over to the district court. In district court, Juranek was charged by information with the same crimes. He entered pleas of not guilty to both counts.

Before trial, Juranek moved to suppress "any and all statements" that he made to the police officers. He argued that the statements were obtained contrary to the 4th, 5th, 6th, and 14th Amendments to the U.S. Constitution and article I, §§ 7 and 12, of the Nebraska Constitution, because the statements were (1) the fruit of an unlawful detention and arrest; (2) neither freely and voluntarily given nor knowingly, understandingly, and intelligently made; (3) made before he was informed of his rights; (4) made without a knowing, understanding, and intelligent waiver of his rights; (5) the result of questions that "the police should have known were reasonably likely to elicit an incriminatory response"; and (6) made after he "unequivocally invoked his right to cut off questioning."

The district court overruled Juranek's motion to suppress. The court made no specific findings in relation to Juranek's statements before he was detained and while he was in the police cruiser. The court briefly explained that the detective's question at the start of Juranek's interview was "not intended to elicit a confession but rather to determine whether [Juranek] was in fact willing to talk," citing to *Oregon v. Elstad*, 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985).

At a bench trial, the State adduced evidence of the statements challenged in Juranek's motion to suppress. The court overruled Juranek's objections and received the evidence. In

testifying to Juranek's statements during the interrogation, the detective stated that he did not read the *Miranda* warnings prior to asking whether Juranek would tell him what had happened, because the question was not intended to elicit a substantive response. When asked why he conducted the interview in the manner that he did, the detective explained, "I was concerned that [Juranek] wasn't wanting to speak with me at all. Therefore, I asked the question. My intent was to see if I was going to be wasting my time trying to talk to him if he did not want to speak with me at all." The detective said that he did not read Juranek the *Miranda* warnings at the outset of the interview because the detective was trying to "build a rapport."

The entire video recording of Juranek's interrogation was received into evidence over his objection. The video recording showed that after waiving his *Miranda* rights, Juranek confessed multiple times to seeking out McBride with the explicit purpose of killing him and to stabbing McBride under the left rib cage. He also stated that he would stab McBride again.

The State adduced testimony from two individuals who witnessed the stabbing. One witness testified that on September 14, 2011, she saw a fight between two older males, one of whom she identified as Juranek. According to this witness, Juranek "[s]hoved [the other man] in the chest," followed the other man as he tried to get away, and then "pushed" the other man a second time. She said that the two men were punching each other and then "[a]ll of [a] sudden," the other man "started screaming and lifted up his shirt" to reveal blood on his left side. The witness' boyfriend also witnessed the incident. However, the boyfriend described what he saw as one man "chasing the other guy" and "swinging . . . at him." The boyfriend said that the one man "was punching somewhere right here in the ribs. And then after a little bit, after he did that, he walked away, and the guy dropped, fell on the floor." The boyfriend could not identify either man as Juranek.

The district court found Juranek guilty of both first degree murder and use of a deadly weapon to commit a felony. The

court sentenced Juranek to life imprisonment and 5 to 10 years' imprisonment, respectively.

Juranek timely appeals. We have a statutory obligation to hear all appeals in cases where the defendant is sentenced to life imprisonment. See Neb. Rev. Stat. § 24-1106(1) (Reissue 2008).

IV. ASSIGNMENTS OF ERROR

Juranek assigns that the district court erred in overruling his motion to suppress and in entering judgment based on evidence insufficient to prove guilt beyond a reasonable doubt.

V. ANALYSIS

1. Suppression of Evidence

(a) Background

[3,4] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), prohibits the use of statements derived during custodial interrogation unless the prosecution demonstrates the use of procedural safeguards that are effective to secure the privilege against self-incrimination. *State v. Rodriguez*, 272 Neb. 930, 726 N.W.2d 157 (2007). *Miranda* requires "law enforcement to give a particular set of warnings to a person in custody before interrogation: that he has the right to remain silent, that any statement he makes may be used as evidence against him, and that he has the right to an attorney, either retained or appointed." *State v. Nave*, 284 Neb. 477, 492, 821 N.W.2d 723, 735 (2012), *cert. denied* ___ U.S. ___, 133 S. Ct. 1595, 185 L. Ed. 2d 591 (2013).

[5] For purposes of *Miranda*, interrogation "refers not only to express questioning, 'but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect.'" *State v. Bauldwin*, 283 Neb. 678, 700, 811 N.W.2d 267, 286 (2012) (ellipsis in original) (quoting *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009)). But "'[s]tatements made in a conversation initiated by the accused or spontaneously volunteered by the accused are not the result of interrogation

and are admissible.'" *State v. Bormann*, 279 Neb. 320, 327, 777 N.W.2d 829, 836 (2010) (alteration in original) (quoting *Rodriguez, supra*).

(b) Whether Admission of Juranek's Statements Violated *Miranda*

(i) Statement Before Detention

[6] Juranek's statement in response to the officer's question about Juranek's eye was not made while he was in custody. A person is in custody for purposes of *Miranda* when there is a formal arrest or a restraint on one's freedom of movement to the degree associated with such an arrest. *State v. Landis*, 281 Neb. 139, 794 N.W.2d 151 (2011). The individual must be "deprived of [his or her] freedom of action in any significant way." *Rodriguez*, 272 Neb. at 943, 726 N.W.2d at 171.

When Juranek said, "He threatened me so I stuck him," he had not been arrested or detained. Indeed, the evidence shows that Juranek's freedom of movement was not at all limited by Andersen's presence. When Andersen's cruiser approached Juranek, Andersen did not pull the police cruiser in front of Juranek so as to block his way. Andersen did not exit the cruiser or make any attempt to get in close proximity to Juranek. Andersen did not order Juranek to stop. Neither did Andersen make any statements that suggested Juranek was a suspect in a crime or in any way being detained by the police. Rather, Andersen got Juranek's attention by yelling "'Hey'" from inside the cruiser. Juranek was not required to stay and answer Andersen's questions. Because Juranek's freedom of movement was in no way restricted at the time he made the statement, we conclude that the statement was not made while Juranek was in custody.

[7] *Miranda* protections apply only when a person is both in custody and subject to interrogation. *Bauldwin, supra*. Therefore, because Juranek's statement in response to the question about his eye was not made while he was in custody, *Miranda* was not implicated. The district court did not err in admitting this statement into evidence.

(ii) Statements in Cruiser

[8] This court has previously held that an individual is in custody for purposes of *Miranda* when "handcuffed and placed in the back seat of a police cruiser." See *Bormann*, 279 Neb. at 326, 777 N.W.2d at 836. Thus, Juranek's statements in the police cruiser were made while he was in custody.

[9] But Juranek's statements in the police cruiser were not the result of interrogation. Juranek had neither been asked questions nor engaged in conversation by Andersen. And there was no evidence that Andersen took any action that would have produced a verbal response from Juranek. Indeed, Juranek appeared to be talking "to himself" as opposed to Andersen. Based on these facts, we conclude that Juranek spontaneously volunteered the statements in the cruiser that he "stuck him once," "wanted to stick him again," and "wanted to kill him." Statements that are "'spontaneously volunteered by the accused are not the result of interrogation and are admissible.'" *State v. Bormann*, 279 Neb. 320, 327, 777 N.W.2d 829, 836 (2010) (quoting *State v. Rodriguez*, 272 Neb. 930, 726 N.W.2d 157 (2007)). Juranek's statements in the cruiser were not the result of interrogation.

Because Juranek's statements in the cruiser were not the result of interrogation, they were admissible despite the fact that he had not been given the *Miranda* warnings. The district court did not err in admitting the statements into evidence.

(iii) Statement in Response to Question "Do you want to tell it to me?"

a. Immediate Response

The difficult issue is whether Juranek's response to the detective's question, "Do you want to tell it to me?" was admissible in the absence of prior *Miranda* warnings. For the following reasons, we find that the district court erred in admitting the statement.

At the time of this statement, Juranek was in custody. Juranek had been handcuffed, driven to the police station in a cruiser, and placed in an interview room for interrogation. Accordingly, the admissibility of Juranek's statement will depend on whether it was the result of interrogation.

[10] For purposes of *Miranda*, interrogation can be "express questioning" or "'any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect.'" *State v. Bauldwin*, 283 Neb. 678, 700, 811 N.W.2d 267, 286 (2012) (ellipsis in original) (quoting *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009)). In determining whether there is interrogation, the question is: "'Would a reasonable and disinterested person conclude that police conduct, directed to a suspect or defendant in custody, would likely elicit an incriminating response from that suspect or defendant?'" *Bormann*, 279 Neb. at 327, 777 N.W.2d at 836 (quoting *State v. Gibson*, 228 Neb. 455, 422 N.W.2d 570 (1988)).

> "A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response."

Id. at 327, 777 N.W.2d at 836 (emphasis in original) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980)).

We apply an objective standard in determining whether a defendant's response was the result of interrogation. See *Bormann, supra*. For this reason, whether a defendant was being interrogated does not depend on the officer's intent in asking the question that elicited an incriminating response. In the instant case, the detective's testimony that his intentions were to find out if Juranek was willing to talk in general and to "build a rapport" with Juranek is not material to our consideration. The issue is whether the detective should have known that his question to Juranek was likely to elicit an incriminating response. We conclude the detective should have known his question was likely to elicit an incriminating response.

Within the context of Juranek's and the detective's prior statements in the interview, the question "Do you want to tell

it to me?" was an explicit invitation for Juranek to tell the detective what had happened that day. The detective asked the question in response to Juranek's statement that he had already told "it" to Andersen "14 times." A reasonable person would have understood the detective's use of the word "it" to be a reference to the same "it" that Juranek said he had told Andersen. Juranek had previously confessed to Andersen. Prior to the interview, the detective learned of these confessions from Andersen. And Juranek knew that the detective was aware of the confessions, because Juranek said that he had told "it" to Andersen 14 times in direct response to the detective's mention of "some information" that Andersen had shared prior to the interview. Thus, "it" was clearly a reference to the confessions that Juranek made to Andersen. Because of the manner in which the detective's question built upon previous uses of the word "it" in the interview, a reasonable person would have understood the question to be an invitation for Juranek to tell the detective what Juranek had previously told Andersen. Therefore, the detective's question was an attempt to elicit a statement from Juranek regarding his prior confessions to the stabbing of McBride.

Moreover, the detective knew about Juranek's propensity to talk without being interrogated and should have expected that if asked about the incident, Juranek would confess again. The detective knew that before Juranek was in custody and again while Juranek was being transported to the police station, he had confessed to the stabbing. A reasonable and disinterested person with such knowledge would have had little doubt that once confronted by the police, Juranek was likely to make an incriminating statement again. Because Juranek had previously given incriminating statements on two separate occasions and because Juranek was aware that the detective knew of those statements, the detective should have known that reference to those statements might prompt Juranek to repeat what he had previously confessed to Andersen.

Once the detective mentioned that he knew of Juranek's prior statements to Andersen, the interrogation had begun and Juranek should have been given the procedural safeguards required by *Miranda*. These warnings are "an absolute

prerequisite to interrogation," see *Miranda v. Arizona*, 384 U.S. 436, 471, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and "fundamental with respect to the Fifth Amendment privilege," *Miranda*, 384 U.S. at 476.

The detective testified that "[n]othing was stopping [him]" from giving the *Miranda* warnings before asking any questions of Juranek. Indeed, less than 1 minute later, when Juranek was advised of the *Miranda* rights, the detective used a series of scripted questions that concluded by asking, "Knowing your rights in this matter, are you willing to speak with me?" The detective admitted that this final question was another way of asking whether Juranek was willing to speak with the detective and would have accomplished the same objectives while also advising Juranek of the *Miranda* rights.

[11] Before Juranek said anything in the interview, it would have required no effort for the detective to advise Juranek that he had the right to remain silent, that any statement he made could be used as evidence against him, and that he had the right to an attorney, either retained or appointed. See, *Miranda*, *supra*; *State v. Nave*, 284 Neb. 477, 821 N.W.2d 723 (2012), *cert. denied* ___ U.S. ___, 133 S. Ct. 1595, 185 L. Ed. 2d 591 (2013). As the U.S. Supreme Court has noted, the Fifth Amendment privilege against self-incrimination is "fundamental to our system of constitutional rule." See *Miranda*, 384 U.S. at 468. Yet, "the expedient of giving an adequate warning as to the availability of the privilege [is] so simple." *Id.* Juranek should have been given the *Miranda* warnings before he was interrogated.

As this case illustrates, questions intended to build a rapport with a defendant can easily cross the line into interrogation. The obvious goal of building a rapport is to entice a defendant to talk, at first perhaps about general matters, but ultimately about the crime being investigated. See, *State v. Hughes*, 272 S.W.3d 246, 255 (Mo. App. 2008) (officer builds rapport "to facilitate . . . further interrogation"); Richard A. Leo, *Questioning the Relevance of* Miranda *in the Twenty-First Century*, 99 Mich. L. Rev. 1000, 1018 (2001) ("rapport-building small talk" used by interrogators to minimize significance of *Miranda* and thereby elicit waiver). As

an interview moves toward the subject of the investigation, it becomes more likely that an officer's questions will elicit an incriminating response. Because an officer cannot be held accountable for unforeseeable results of his or her questions, we focus on whether, when asking any particular question, an officer *should have known* that the question was likely to elicit an incriminating response. See *State v. Bormann*, 279 Neb. 320, 777 N.W.2d 829 (2010). In the instant case, the particular circumstances surrounding Juranek's custody and the specific context of the detective's question were such that the detective *should have known* that his question would elicit an incriminating response.

[12] Juranek's statement in response to the question "Do you want to tell it to me?" was the result of a custodial interrogation conducted without *Miranda* warnings. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his or her free choice. *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The district court erred in admitting Juranek's response to the question.

b. Statements Following *Miranda* Advisement

After Juranek was given the *Miranda* warnings, he waived his rights and agreed to talk to the detective. During the remainder of the interview, Juranek made numerous other incriminating statements that repeated his unwarned confession. Juranek argues that because he confessed before receiving the *Miranda* warnings, his subsequent waiver was not voluntary, and that his post-*Miranda* confessions should also be excluded. We do not agree.

Juranek's argument is based on *Missouri v. Seibert*, 542 U.S. 600, 604, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004), in which the U.S. Supreme Court addressed the two-step interrogation technique of (1) giving *Miranda* warnings only after interrogation has produced a confession and then (2) questioning the suspect so as to "cover the same ground a second time," but this time with *Miranda* warnings. A plurality of the Court

concluded that "when *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and 'depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.'" See *Seibert*, 542 U.S. at 613-14 (alteration in original) (quoting *Moran v. Burbine*, 475 U.S. 412, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986)). The plurality explained that when a suspect is advised of his or her *Miranda* rights in the middle of an interrogation, the issue becomes whether the warnings effectively advised that he or she "could choose to stop talking even if he [or she] had talked earlier." See *Seibert*, 542 U.S. at 612.

Before *Seibert*, the U.S. Supreme Court had rejected this approach. In *Oregon v. Elstad*, 470 U.S. 298, 309, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985), the Court addressed the identical question and concluded that

> [i]t is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period.

In *Seibert*, 542 U.S. at 615, the U.S. Supreme Court distinguished *Elstad* based on facts in *Seibert* that indicated the *Miranda* warnings, given after interrogation produced a confession, were not "effective enough to accomplish their object." The Court mentioned the following facts as possible indicators that the *Miranda* warnings were ineffective:

> the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first.

See *Seibert*, 542 U.S. at 615. Of particular significance to the Court's conclusion that Seibert's pre-*Miranda* confession made the later *Miranda* warnings ineffective was the fact the questioning before the *Miranda* warnings was "systematic,

exhaustive, and managed with psychological skill" to such an extent that after the unwarned interrogation, "there was little, if anything, of incriminating potential left unsaid." See *Seibert*, 542 U.S. at 616.

Since *Seibert*, the U.S. Supreme Court has concluded that the two-step interrogation technique condemned in *Seibert* is not necessarily present in every scenario involving the pairing of unwarned and warned interrogations. In *Bobby v. Dixon*, 565 U.S. 23, 132 S. Ct. 26, 181 L. Ed. 2d 328 (2011), the Court declined to hold a defendant's waiver of his *Miranda* rights ineffective for the reason that the circumstances surrounding the interrogation distinguished it from the two-step interrogation technique condemned in *Seibert*.

In the case at bar, the facts are readily distinguishable from *Missouri v. Seibert*, 542 U.S. 600, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004). The circumstances of the pre- and post-*Miranda* interrogations of Juranek did not rise to the level of making the *Miranda* warnings ineffective. Considering that the detective asked one question before Juranek made his confession and that Juranek was given the *Miranda* warnings approximately 2 minutes into the interrogation, we cannot say that the pre-*Miranda* interrogation left little to be said. In *Seibert*, the questions before the *Miranda* warning were systematic, exhaustive, and managed with psychological skill. Here, the pre-*Miranda* interrogation of Juranek lasted less than 2 minutes. It did not touch upon key points in the investigation, such as how Juranek knew McBride, how the stabbing occurred, or where the weapon Juranek used could be found. The facts are sufficiently distinguishable from those in *Seibert*.

Juranek's pre-*Miranda* confession did not render ineffective the *Miranda* warnings that he was given less than a minute later. In light of Juranek's waiver of his *Miranda* rights, the statements he made after he was given the *Miranda* warnings were admissible.

c. Harmless Error

The district court erred in admitting evidence of Juranek's confession during the pre-*Miranda* interrogation. However, we

conclude that this evidence was cumulative to other admissible evidence and that its admission was harmless error.

[13-15] "[T]he improper admission of evidence is a 'trial' error and subject to harmless error review." *State v. Sorensen*, 283 Neb. 932, 938, 814 N.W.2d 371, 377 (2012). Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error. *State v. Pangborn*, 286 Neb. 363, 836 N.W.2d 790 (2013). Erroneous admission of evidence is harmless error and does not require reversal if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact. *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006).

In the pre-*Miranda* interrogation, Juranek said that (1) McBride threatened to kill Juranek, (2) Juranek stabbed McBride, and (3) Juranek would have stabbed McBride again but for the fact that McBride ran away. These three facts were proved by other admissible evidence. When Andersen first approached Juranek in the police cruiser, Juranek stated, "He threatened me so I stuck him." In the police cruiser, Juranek stated that he stabbed McBride once and "wanted to stick him again." And in the post-*Miranda* portion of the interrogation, Juranek said at least two times that McBride threatened to kill Juranek and that Juranek stabbed McBride. These statements were evidence that McBride threatened Juranek, that Juranek stabbed McBride, and that Juranek wanted to stab McBride again.

Other relevant evidence supported the district court's finding of guilt. One witness testified that she saw Juranek stab the other man, who was later identified as McBride, in the fight and chase McBride when he tried to get away. Also, the officer that arrived first at the scene of the stabbing testified that McBride identified his assailant as "Mike" and pointed to a man later identified as Juranek. In addition, after waiving his *Miranda* rights, Juranek confessed to seeking out

McBride with the explicit purpose of killing him and to stabbing McBride under the left rib cage.

The evidence that was properly admitted supported the district court's determination that Juranek was guilty of the crimes charged. Furthermore, the erroneously admitted statement by Juranek was cumulative of other evidence. As such, the admission of Juranek's confession obtained during the pre-*Miranda* interrogation was harmless error.

2. Sufficiency of Evidence

Juranek assigns that there was insufficient evidence to convict him. He specifically argues that there was insufficient evidence to prove that his actions were premeditated and deliberate, because his actions "more appropriately fit into the definition of 'sudden quarrel manslaughter.'" Brief for appellant at 12.

When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. *State v. McGuire*, 286 Neb. 494, 837 N.W.2d 767 (2013).

Under Neb. Rev. Stat. § 28-303 (Reissue 2008), an element of first degree murder is that the act of killing was done "purposely and with deliberate and premeditated malice." Juranek claims that the evidence was insufficient to prove deliberate and premeditated malice. He does not argue that the evidence was insufficient as to any of the other elements of first degree murder.

The State adduced evidence that on September 14, 2011, Juranek learned for the first time that McBride had threatened to kill him. The State also presented evidence that in response to this knowledge, Juranek sought McBride out with the purpose of killing him. At least five times during the post-*Miranda* interrogation, Juranek explained that he was deliberately seeking out McBride with the intent to kill him. At one point,

Juranek said that on the day of the stabbing, he walked around until he found McBride. At another point, Juranek said, "If I had had a gun, I would have emptied the clip." This evidence was sufficient basis for a reasonable trier of fact to find beyond a reasonable doubt that Juranek killed McBride purposely and with deliberate and premeditated malice.

The State adduced sufficient evidence for a rational trier of fact to find that Juranek killed McBride purposely and with deliberate and premeditated malice. There was sufficient evidence to support Juranek's conviction for first degree murder. There was sufficient evidence to support a conviction for use of a deadly weapon to commit a felony.

VI. CONCLUSION

For the reasons set forth, we affirm Juranek's convictions and sentences.

AFFIRMED.

HEAVICAN, C.J., participating on briefs.

HEAVICAN, C.J., concurring.

I concur in the decision of the court, which affirmed Juranek's convictions and sentences. But I write separately because I disagree with the majority's conclusion that Juranek's statement to the detective following the detective's question "Do you want to tell it to me?" should have been suppressed.

As is noted by the majority, in determining whether there is an interrogation for *Miranda* purposes, the question to ask is whether "'a reasonable and disinterested person [would] conclude that police conduct, directed to the suspect or defendant in custody, would likely elicit an incriminating response from that suspect or defendant.'"[1]

In this case, as was discussed in more detail by the majority, Juranek made certain statements while in the police cruiser on his way to the police station from the scene of his arrest. Those statements were incriminating. Upon arriving at the police station, a detective met Juranek and attempted to shake his hand. Juranek refused, indicating that his (i.e., Juranek's) hands were "dirty." The detective then told Juranek that he

[1] *State v. Bormann*, 279 Neb. 320, 327, 777 N.W.2d 829, 836 (2010).

knew that Juranek had "shared" some information with the transporting officer. Juranek responded that he "told it to him 14 times." The detective responded, "Ok. Do you want to tell it to me?"

The detective testified that he was attempting to build a rapport with Juranek and did not intend to elicit an incriminating response from Juranek by asking this question. I reject the majority's conclusion that the detective "should have expected" that Juranek would confess again. In my view, the detective's actions were not inconsistent with rapport building. The detective attempted to shake Juranek's hand. He inquired of Juranek whether Juranek wanted to tell him what he told the other officer—at its root, a question requiring only a "yes" or "no" answer.[2] While I agree that ultimately the detective wanted to talk about the incriminating statements Juranek had made to Andersen and later in the cruiser, I do not agree that a "reasonable and disinterested person" would find that the detective was, in this moment, attempting to elicit an incriminating response from Juranek.

For this reason, I would conclude that Juranek's statement need not be suppressed.

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[2] See, e.g., *State v. Eli*, 126 Haw. 510, 273 P.3d 1196 (2012); *State v. Riggs*, 987 P.2d 1281 (Utah App. 1999), *abrogated on other grounds*, *State v. Levin*, 144 P.3d 1096 (Utah 2006).

STATE OF NEBRASKA, APPELLEE, V.
SUSAN M. DEJONG, APPELLANT.
845 N.W.2d 858

Filed April 11, 2014. No. S-12-432.

1. **Motions to Suppress: Confessions: Constitutional Law: Miranda Rights: Appeal and Error.** In reviewing a motion to suppress a statement based on its claimed involuntariness, including claims that law enforcement procured it by violating the safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. Whether those facts

meet constitutional standards, however, is a question of law, which an appellate court reviews independently of the trial court's determination.

2. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
3. **Evidence.** Determining the relevancy of evidence is a matter entrusted to the discretion of the trial court.
4. **Rules of Evidence: Other Acts: Appeal and Error.** It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 403 and 404(2), Neb. Rev. Stat. §§ 27-403 (Reissue 2008) and 27-404(2) (Cum. Supp. 2012), and the trial court's decision will not be reversed on appeal absent an abuse of discretion.
5. **Miranda Rights.** *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), adopted a set of prophylactic measures to protect suspects from modern custodial interrogation techniques. The safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.
6. **Self-Incrimination: Right to Counsel.** If the suspect indicates that he or she wishes to remain silent or that he or she wants an attorney, the interrogation must cease.
7. **Right to Counsel.** When a suspect invokes his or her right to counsel, the suspect must not be subject to further interrogation by the authorities until counsel has been made available to him or her, unless the accused initiates further communication, exchanges, or conversations with the police.
8. **Confessions.** Voluntary confessions are not merely a proper element in law enforcement, they are an unmitigated good, essential to society's compelling interest in finding, convicting, and punishing those who violate the law.
9. **Constitutional Law: Confessions.** Volunteered statements of any kind are not barred by the Fifth Amendment, and their admissibility is not affected by the holding in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).
10. **Criminal Law: Self-Incrimination: Appeal and Error.** In considering whether a suspect has clearly invoked the right to remain silent, an appellate court reviews not only the words of the criminal defendant, but also the context of the invocation.
11. **Self-Incrimination: Police Officers and Sheriffs.** Relevant circumstances in determining whether a suspect has clearly invoked the right to remain silent include the words spoken by the defendant and the interrogating officer, the officer's response to the suspect's words, the speech patterns of the suspect, the content of the interrogation, the demeanor and tone of the interrogating officer, the suspect's behavior during questioning, the point at which the suspect allegedly invoked the right to remain silent, and who was present during the interrogation. A court might also consider the questions that drew the statement, as well as the officer's response to the statement.

12. **Trial: Evidence: Confessions: Appeal and Error.** The admission of an improperly obtained statement is a trial error, and so its erroneous admission is subject to harmless error analysis.
13. **Trial: Evidence: Appeal and Error.** To conduct harmless error review, an appellate court looks to the entire record and views the erroneously admitted evidence relative to the rest of the untainted, relevant evidence of guilt.
14. **Verdicts: Appeal and Error.** Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.
15. **Trial: Evidence: Appeal and Error.** Erroneous admission of evidence is harmless error and does not require reversal if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact.
16. **Constitutional Law: Confessions: Waiver.** The fact that a defendant has shared a secret in an inadmissible statement does not preclude the defendant from later waiving his or her constitutional rights after the conditions that induced the original statement have been removed.
17. **Confessions: Police Officers and Sheriffs: Evidence.** For a subsequent confession made after an inadmissible confession, a court focuses on the voluntariness of any subsequent statement. The court should evaluate the entire course of police conduct and the surrounding circumstances, including whether or not the conditions that made the first statement inadmissible had been removed.
18. **Miranda Rights: Confessions: Waiver.** A subsequent confession made after an inadmissible confession can be admissible if curative measures are undertaken to ensure that a reasonable person in the suspect's situation would understand the import and effect of the warning and waiver under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Appeal from the District Court for Jefferson County: PAUL W. KORSLUND, Judge. Affirmed.

James R. Mowbray and Jeffery Pickens, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

MCCORMACK, J.

NATURE OF CASE

Susan M. DeJong was convicted of first degree murder and use of a deadly weapon to commit a felony for the death of

her husband, Thomas DeJong (Tom). Although Susan raises several issues, the primary issue presented is whether Susan's statements made after 4:18 a.m. on March 12, 2011, while in police custody, are admissible as volunteered statements. We conclude that the statements made after 4:18 a.m. by Susan were voluntary and were not required to be suppressed under U.S. Supreme Court precedent.

BACKGROUND

On March 11, 2011, Susan called the 911 emergency dispatch service at approximately 4 p.m. Susan told the operator that her husband, Tom, was not breathing and was cold to the touch. Susan stated that Tom had gone to South Dakota to be with his "whore" and came home "all . . . beat up." The operator had Susan perform cardiopulmonary resuscitation on Tom until the emergency units arrived.

When emergency personnel arrived at the DeJong home, Susan was hysterical and she repeatedly stated that the "whore" had done this to Tom. Emergency personnel immediately began resuscitation efforts. Tom was not breathing, and there was no heartbeat. Dried blood was around his nostrils and the top of his mouth. His hands, arms, feet, legs, torso, and head were visibly scratched, cut, and deeply bruised. Emergency personnel were able to help Tom regain a heartbeat.

Tom was taken to the Jefferson Community Health Center and was later transported by ambulance to Bryan Health, west campus trauma center, in Lincoln, Nebraska (Bryan hospital). Laboratory reports and blood tests indicated a threat of imminent heart and renal failure. A chest x ray indicated multiple rib-sided fractures and a partially collapsed lung. A CAT scan revealed the following injuries: a swollen brain; a tremendous amount of fractures within the chest cavity, including the spine, the ribs, and the scapula; a comminuted fracture of the nose; and a possible fracture of the hyoid bone in the neck.

The treating physicians concluded that Tom would not be able to recover from the injuries. The physicians asked Susan for permission to remove Tom from life support, and she granted the request. Tom passed away shortly thereafter.

Susan's Statements at Hospitals

At the Jefferson Community Health Center, Rebecca McClure, a nurse, stayed with Susan while waiting for Tom's prognosis. The two of them waited in a small quiet room located outside of the emergency room.

Susan told McClure that she had not seen Tom since Wednesday and that he came home that Friday morning. She stated that Tom was "stumbling around in the house" and that the noise woke her up. Tom had been beaten, was cold, and quickly became unresponsive. Susan told McClure that Tom had spent the past days visiting the "whore" in South Dakota. According to Susan, the "whore" would beat Tom with tie-down straps from Tom's semi-truck. Susan also stated that the "whore" and Tom were trying to kill her by giving her a sexually transmitted disease (STD). McClure personally drove Susan home after Tom was transported to Lincoln, and Susan then drove herself to Bryan hospital in Lincoln.

Investigator Wendy Ground from the Lincoln Police Department arrived at Bryan hospital at approximately 10:20 p.m. Ground questioned Susan about Tom's injuries. Susan told Ground that Tom had returned home that morning. He looked pale, and he had stated that he did not feel well. Susan told Ground that Tom was apologetic and that he had told her he had made a mistake. According to Susan, Tom said his alleged mistress did not love him and that the mistress went "psycho" and wanted to kill him. Susan told Ground that the mistress had previously tried to kill Susan by cutting her vehicle's brake lines.

Ground asked Susan about Tom's medical history. Susan stated that Tom had been feeling weak and clumsy for the past 2½ years. Susan stated that he was diagnosed with an STD 1½ years ago. Susan also explained that the current cut on Tom's lip was caused by a pipe when Tom was working with a cow.

After Tom had been declared dead, Ground asked Susan if she was willing to go to the police headquarters for an interview. Susan agreed.

INTERROGATION OF SUSAN AT POLICE HEADQUARTERS

After arriving at the police headquarters at approximately 1 a.m., Ground placed Susan in an interview room. Ground left the room, and Susan began working on her written statement. Susan was left alone in the interview room from 1:12 to 3:04 a.m.

At approximately 3:04 a.m., Ground reentered the interview room. At 3:08 a.m., Ground read Susan her *Miranda* rights and Susan told Ground that she understood her rights. Susan proceeded to sign the *Miranda* waiver.

Ground began the interrogation by asking general questions about Tom's injuries and his whereabouts for the week. Susan repeated the facts as she had stated at Bryan hospital.

Susan stated Tom went to Seward, Nebraska, on Monday, March 7, 2011, for a job application and from there he went directly to South Dakota. Susan told Ground that she had talked to him on her cell phone on Monday, March 7, for approximately 44 minutes. According to Susan, Tom indicated that he wanted to be with "that thing." On March 8, Susan and Tom talked for 5 minutes, and Susan told Ground that she likely screamed at him because she was not happy.

At approximately 3:22 a.m., Susan told Ground that she was exhausted. But she continued to talk. Susan explained that the next time she heard from Tom was on Friday morning. She again repeated the same story of what had occurred that day. At approximately 3:34 a.m., Susan stated that she needed some sleep because she was exhausted.

The questioning continued, and Susan stated that she had confronted Tom when he came home on Friday morning because she was angry. Susan told Ground that she cannot say for sure that Tom drove home and that she does not know how he could have driven in his condition.

At approximately 3:41 a.m., Investigator Robert Farber entered the room and silently sat at the table. At 3:42 a.m., Susan began crying, and at 3:43 a.m., she stated, "I'm tired. I wanna go to bed, please. I'm done, I wanna go to sleep. I'm tired." Farber immediately interrupted her and

introduced himself. Farber then told Susan that he had "a couple questions."

Farber began questioning. He asked Susan when Tom and she were married and whether they have common children. Farber questioned Susan about her relationship with Tom and about Tom's alleged relationship with his mistress. The questions became more directed and intense as Farber continued the interrogation.

In response to the questioning, Susan stated that everybody called Tom a "wheeney" and that he took the beatings from his alleged mistress. Susan also stated that Tom had slapped her in Minnesota. Susan explained that she was arrested for that incident because she decided to not tell the police that Tom had slapped her.

At approximately 4 a.m., Susan again stated, "I'm getting tired, I'm done, I'm tired." Farber interjected again before Susan completed the statement. Farber asked Susan if she had anything to do with the injuries. Susan answered no; Farber continued to ask questions, and Susan continued to answer. For the next 18 minutes, the questions from Farber became more pointed and directed.

At 4:18 a.m., Susan exclaimed, "I want a lawyer, please. I'm tired of this." "I will talk [to] them and they, I want some sleep, please." "I didn't, I will, I just wanted to live and I loved him so much, and I just wanted to live and he wanted a divorce, and I just wanted to live with him. . . . I loved him." Farber said "okay" and left the room almost immediately. Ground followed.

Susan laid her head down at the table for approximately 30 seconds, stood, and grabbed her keys to leave. Susan opened the door to the interview room and asked to have a cigarette. Ground told her to take a seat. Susan turned around and mumbled, "So sorry. I'm sorry." Ground apparently paused to hear what Susan said and then reentered. Ground silently took a seat at the table in the same spot she sat during the entire interrogation.

Susan talked uninterrupted for nearly 8 minutes with a slow delivery, while Ground sat and listened. Susan stated:

So sorry. I'm sorry. (inaudible) beat by that whore. He used to come home, bruises, bloody nose, black eyes. He's got scars on his back that are not from me. He's got marks on him that are not from me. He'd come home and, well, he'd tell his boss (inaudible) on the trip. He'd tell me he did it on the truck going to (inaudible). Then he'd turn around, go to Sioux Falls and that Gloria. Oren called me today and asked if I'd seen your face. It's all bruised up. I told him that fuckin' cunt you're married to did it. (inaudible) I didn't ever touch him. Didn't ever touch him. When I slapped him in Fairbury, not Fairbury, in (inaudible), what the name of that town? I can't think of it, Burger King, God. The car pulls in there, parked, to get a burger but on the way in is when he finally admitted he'd been sleeping with that thing. Finally admitted it. He got our money, went into Burger King. I got out of the truck and proceeded to walk across the highway to the other little truck stop across the road and he followed me over there. Came up to me, grabbed one of the dogs and I picked my leg up. Leave it alone. And then I proceeded, I walked, was walking, trying to call my son to come get me but he wouldn't answer his stupid phone. Standing there at the back, I'm like I'm going home. I'm going home. Well, fine, I'll take you home. I don't know. I'm going home. That's when he shoved me into the wall and cracked me in the jaw. And I slapped him. Some kid walked out of Burger King. So I'm yowling so he called the cops. Next thing I know they're showing up. He said I'll take you home, I'll take you home. Fine, I'll take you home. Fine, I'll take you home. Then we got in the truck. Next thing I know there's the cops. Everybody thinks Tom is such an innocent man. He used to be. He used to be the most loving, gentle, sweet man you could meet. Till he met that (inaudible). Then they started molesting children. I still say I think he was on drugs. Cuz you don't drive 14, 16 hours with nothing. My Blazer for one hasn't ever had a problem with the brakes. I hit a deer. Well, come to find

> out my front brakes are disconnected. Huh. Excuse me. I don't know. I just know that (inaudible) no more getting shoved. (inaudible) I didn't poison him. He is what he is from what he plays with. (inaudible) He told me he was going to kill me. (inaudible) kill me. (inaudible) Am I under arrest?

Ground told Susan that the decision for arrest was up to the police department in Fairbury, Nebraska. Ground answered some questions from Susan, but did not ask Susan any questions.

Susan continued:

> Self-defense, because I don't bruise and he does. That's pretty much the way that goes. (inaudible) she did (inaudible) to him. For what she did to him. He wasn't the man I married. What I told you about it is all true. It does deal drugs, (inaudible) drugs, go psycho. And it went psycho on him more than once. Does molest children. Little boy's name's Chris. . . . I have to be arraigned within 24 hours. I know that, why not. Just like the deal in Minnesota. And he'll walk away scott free. And there's a lot of the injuries he had [that were] not from me. The worse one he get that I can remember is falling off the ladder. That one scared me. Why didn't I just leave. Why didn't I just run. Because he always showed up. He always showed up. (inaudible) I need some sleep. (inaudible) so tired. I just, I just need somebody to talk for me right now, I'm so tired. I'm too tried. I haven't (inaudible) for two days. Could you? I want a cigarette.

Ground responded: "Okay, just be patient with us." Susan continued:

> No, I want a cigarette. I want a cigarette. Then He did take off and go back to S.D. (inaudible) either. It's all partly true. The whole story is partly true. I don't know. He came back beaten up from S.D. too. I didn't hit him in the head. (inaudible) when he fell on it. I stepped on it. That was after he threw it at me is how it ended up there. I'm not under arrest. I can go outside and have a cigarette if I want.

After a back and forth conversation between Susan and Ground, Susan stated, without being questioned:

> (inaudible) you'll arrest me because that's the way it always goes. Let's (inaudible) her and she's the one that always gets in trouble. (inaudible) self defense, self preservation. They made sure of it. It takes a heck of a hit for me to bruise but . . . make sure that and Tom knew it.

Shortly thereafter, an unidentified female officer entered the room. Ground and the female officer took pictures of Susan's bruised hands and forearms. The interrogation video ends. Susan was subsequently arrested and charged with first degree murder and use of a deadly weapon to commit a felony.

HEARING ON MOTION TO SUPPRESS INTERROGATION

On June 13, 2011, Susan filed a motion to suppress her statements given on March 12, which she argued were obtained in violation of her constitutional rights. Susan argued that there were three different statements made by her that invoked her constitutional right to end the interrogation. At 3:43 a.m., Susan stated, "I'm done, I wanna go to sleep. I'm tired." At 4 a.m., Susan stated, "I'm getting tired, I'm done, I'm tired." And the last relevant statement was made at 4:18 a.m., when Susan stated, "I want a lawyer, please. I'm tired of this."

At the hearing, the district court accepted a joint stipulation that Susan was in custody at the time of the interrogation.

In its order, the district court found Susan's first two statements were not unequivocal and unambiguous statements that she wanted to cut off the questioning. Additionally, the court found that all of the statements made by Susan after exercising her right to counsel were voluntarily made and were not the result of the functional equivalent of interrogation.

Susan filed a motion to reconsider. Upon reconsideration, the district court suppressed the statements made from 4 to 4:18 a.m., because her statement that she was "done" was unequivocal and unambiguous. However, statements made before 4 a.m. were admissible, because Susan had not

yet invoked her right to end questioning. The district court found that statements made after 4:18 a.m. were admissible, because they were not the result of questioning or the functional equivalent.

Rule 404 Hearing

On January 26, 2012, the State filed an "Amended Motion to Conduct Hearing Pursuant to Neb. Rev. Stat. § 27-104 Regarding the Admissibility of § 27-404(2) Evidence."[1] A hearing was held on the same date (rule 404 hearing), and evidence was accepted. There are three prior "bad acts" that the State wanted admitted for limited purposes.

For the first prior "bad act," the State offered the testimony of then-police officer Nicholas Schwalbe of Jackson, Minnesota. Schwalbe testified that on May 31, 2010, he received a call of a fight in progress at a truckstop. He identified the driver as Tom and the passenger as Susan. Schwalbe observed that Tom had a black eye, a fresh wound under that eye, and scabbing on his face, ear, and neck, as well as spots of fresh blood rolling down his neck. Susan was placed under arrest. Susan told Schwalbe that they were fighting because Tom was cheating on her.

The second event occurred in August 2010. James Platt, Susan's son, and Sharon Platt, James' wife, testified that Susan and Tom unexpectedly came to live with them that August. Susan told them that she and Tom needed to get away from their home, which was in South Dakota at the time. Both James and Sharon testified that Tom was "in bad shape." Tom's face was beaten and swollen, and he had bloody ears. When asked, Susan told James that the injuries were caused by a truckstop robbery. James testified that Susan had for years believed Tom was unfaithful with someone from work. Shortly thereafter, James testified that Susan and Tom moved to Jefferson County, Nebraska.

The third event occurred in late 2010. James and Sharon visited Susan and Tom at their new home in Jefferson County.

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[1] See Neb. Evid. R. 104 and 404(2), Neb. Rev. Stat. §§ 27-104 (Reissue 2008) and 27-404(2) (Cum. Supp. 2012).

Both testified that Tom looked "'terrible.'" He had cuts on his face and a split lip. Sharon asked Tom about his facial injuries, and Susan replied for Tom that the injuries happened at work when "the pigs got him."

At the hearing, the State also offered the testimony of McClure, Brian Bauer, and Ground. McClure testified about Susan's story that Tom had gone to South Dakota "probably up visiting his girlfriend." She testified about what Susan had told her at the hospital.

Bauer, who had employed Tom on his farm in Jefferson County, testified that Tom would come to work every 2 to 3 weeks visibly sore with bruises on his face, black eyes, split lips, and marks on his hands. According to Bauer, these injuries did not occur at work.

Ground testified that at the hospital, Susan stated that Tom's facial injuries and split lip were caused by working on the farm. Susan told her that the split lip was caused by a pipe when Tom was working with a cow.

Based on the evidence presented, the district court found that the May 31, 2010, incident in Minnesota was admissible as it pertains to the injuries observed on Tom and to Susan's statement as to the reason for their altercation, for the specific and limited purposes of demonstrating the existence of motive and intent. The district court further ordered that all three incidents were admissible for the specific and limited purposes of negating, or demonstrating the existence of, intent, identity of the perpetrator, and absence of mistake or accident.

TRIAL

A jury trial was held on February 21, 2012. The State offered the testimony of the 911 dispatcher, the responding emergency personnel, the investigating officers, Farber, Ground, McClure, Bauer, Schwalbe, and James and Sharon. The State offered the video interrogation of Susan at the police headquarters, with the footage from 4 to 4:18 a.m. redacted. The three prior bad acts that were the subject of the rule 404 hearing were also presented to the jury. In addition, the following evidence was presented.

Evidence Found at Home

The DeJong home was searched on March 12, 2011. Tom's Chevrolet Blazer was parked in the detached garage. No evidence was found in the garage or either in or on the Blazer. Susan's white pickup truck was processed on March 15. Tom's blood was found on the hood and fender of the truck. Inside the pickup truck, there was a red duffelbag and a blue denim bag.

In the red bag, investigators found women's clothing, a yellow hammer, a blue hammer, toiletry items, men's pajamas, and Tom's wallet. The blue bag contained a computer, a lug wrench, and a cell phone.

DNA tests were conducted on this evidence, and results showed that the blue hammer had a mixture of Tom's and Susan's DNA. Susan's DNA was found on the handle of the yellow hammer, and a mixture of DNA was found in a blood sample on the claw area of the yellow hammer. Tom was the major contributor of that DNA. Tom's DNA was found in the bloodstains on the men's pajamas.

In the house, at least 70 blood drops were found throughout. No large pools of blood were found. Blood was found in the living room, kitchen, bathroom, dining room, and the master bedroom. Blood was also found on clothing items seized from the laundry room. A forensic scientist testified to which stains were left by Tom, by Susan, or by a mixture of the two. Tom's DNA was found repeatedly in the bloodstains throughout the house.

Medical Testimony

Dr. Craig Shumard was working in the emergency room when Tom was brought by ambulance to the Jefferson Community Health Center. Shumard described Tom's injuries to the jury and testified that the injuries did not arise from natural causes or accidents. He testified that Tom's injuries were inconsistent with typical farmwork injuries.

Dr. Stanley Okosun, a trauma surgeon at Bryan hospital, testified to his treatment and care of Tom. Okosun testified that Tom's high levels of myoglobin indicated that the trauma inflicted on Tom occurred 12 to 24 hours prior to his arrival

at Bryan hospital. Okosun testified that Susan told him that Tom's bruising was caused by working on a pig farm. Okosun testified that the explanation was highly unlikely. He further testified that with the injuries suffered, Tom could not have driven home on the Friday morning before his death. According to Okosun, Tom's injuries could not have been caused by natural causes or a car accident. He attributed Tom's injuries to blunt force trauma caused by an assault.

Dr. Juris Purins was the radiologist who reviewed the CAT scan performed on Tom at Bryan hospital. The CAT scan revealed unusually severe head and brain injuries which are typically associated with a patient's not breathing. Tom's nose had a comminuted fracture, which means it was fractured in multiple places. Tom had a dislocation of the lens in his right eye, which was another unusual injury. Purins described a tremendous number of fractures within the chest cavity, including the spine, ribs, and scapula. One of the fractures was an old injury but the rest were recent. Purins also identified a fracture of the hyoid bone in the neck. Purins testified that the fractured hyoid bone, along with subcutaneous emphysema, indicated a potential choking injury. Purins opined that the injuries were the result of a "pretty severe beating," maybe from a hammer, and that the injuries would have prevented Tom from driving or walking.

Dr. Jean Thomsen was the pathologist who performed Tom's autopsy. Thomsen stated that she had "never seen someone so extensively injured." After the autopsy, Thomsen found the cause of death to be "[b]lunt force trauma to the head, neck, chest and extremities." In her opinion, Tom's death was a homicide.

In her autopsy report, Thomsen found defects on Tom's hands and arms that she described as defensive wounds. Thomsen found that the injuries were caused by some type of instrument. Thomsen testified that the injuries were C-shaped and semicircular and may have been caused by a hammer. The autopsy also confirmed a fracture of the hyoid bone in the neck, but she did not find other signs usually associated with manual strangulation beyond neck bruising.

Defense counsel offered the expert testimony of Dr. Robert Bux, a forensic pathologist. Bux agrees that this case was a homicide caused by multiple instances of blunt force trauma. He stated that he has "never personally seen a case like this with so much soft tissue contusion." Tom was "really beaten." Bux opined that the injuries occurred at least 24 hours prior to death, and maybe as many as 36 hours prior. He agrees that the wounds on Tom's hands and arms indicate that Tom was attempting to ward off an attack.

Bux disagreed that a clawhammer was used, because there were no circle bruises from the hammerhead, no raking marks from the claw, and no pattern of contusions consistent with the side of a hammer. He opined that based on a lack of hemorrhaging around the hyoid bone, the bone had been fractured during the autopsy. He argued that the brain injuries were caused not by the blunt force trauma but by Tom's not breathing while still at home. Bux also testified that Tom would have been able to walk and talk immediately after the beating he suffered, but that his condition would have continued to deteriorate. Bux also opined that because of the relatively small amounts of blood found in the home, the assaults that caused Tom's facial injuries likely did not occur in the home.

Instant Messenger Chats

An investigator seized Susan's computer and found relevant Internet instant messenger chats. James, Susan's son, confirmed the messages were sent to him from Susan under her handle "the_piglady." On September 24, 2010, the "the_piglady" wrote in reference to Tom, "i can't do this . . . staying here anymore," "i've come to realize i literally hate him." She continued, "now i wish he was dead . . . i really hate him more than i have ever hated ANYONE." On February 14, "the_piglady" wrote that "i'm looking at getting rid of tom" and "i can't take or do this anymore."

Tom's Whereabouts Week of His Death

Beyond testifying about Tom's injuries while working at the farm, Bauer testified that on the Tuesday before his death,

Tom worked a full day. Tom was bruised and had trouble getting around. On Wednesday and Thursday, Tom called in sick. On Thursday, Bauer drove by the house and noticed that both vehicles owned by the DeJongs were at the house, including Tom's Blazer.

James testified that he had a telephone conversation with Susan on the Thursday morning before Tom's death. James asked Susan what size tires were on Susan's white pickup truck. James testified that Susan asked someone else in the house. James assumed that the person was Tom and was surprised that Tom was not working. James testified that Susan did not mention in that telephone call that Tom was in South Dakota.

Cell phone records were also introduced into evidence. On March 8, 2011, the Tuesday before Tom's death, there were four calls from Susan's cell phone to Tom's cell phone and the calls "hit" or "pinged" off the nearby cell towers in the Fairbury and Hebron, Nebraska, areas. On Wednesday and Thursday, there were calls from Tom's cell phone to Bauer's cell phone. Both calls "hit" off cell towers in the Fairbury and Hebron areas.

Alleged Mistress

The woman who Susan alleged was Tom's mistress also testified at trial. The woman worked as a dispatcher for a small trucking company in South Dakota. Tom had been a truckdriver for that company. The woman testified that she and Tom had a working relationship only. She never spent time with Tom socially. She never had any type of sexual contact with Tom. She testified that she had no reason to want to hurt Tom or Susan. The woman testified that from March 8 to 11, 2011, she was on a trip to Minnesota and had no contact with Tom. She testified that she did not inflict Tom's injuries.

Convictions and Sentences

After deliberation, the jury found Susan guilty on count I, murder in the first degree, and guilty on count II, use of a deadly weapon to commit a felony. Susan was sentenced to

life imprisonment for count I and 50 to 50 years' imprisonment on count II, to be served consecutively. Susan now appeals.

ASSIGNMENTS OF ERROR

Susan assigns, restated and summarized, that the district court erred by (1) admitting at trial the statements she made to investigators between 3:43 to 4 a.m.; (2) admitting at trial the statements she made to investigators after 4:18 a.m.; (3) admitting at trial evidence of Tom's injuries on prior occasions and her related statements concerning the injuries, because there was no clear and convincing evidence that she had committed a crime, wrong, or act with respect to those injuries; and (4) admitting at trial evidence of Tom's injuries on prior occasions and her related statements concerning the injuries, because the probative value of the evidence was substantially outweighed by the danger of unfair prejudice.

STANDARD OF REVIEW

[1] In reviewing a motion to suppress a statement based on its claimed involuntariness, including claims that law enforcement procured it by violating the safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*,[2] we apply a two-part standard of review. Regarding historical facts, we review the trial court's findings for clear error. Whether those facts meet constitutional standards, however, is a question of law, which we review independently of the trial court's determination.[3]

[2-4] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.[4] Determining the relevancy of evidence is a matter entrusted to the discretion of the trial court.[5] Likewise, it is

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[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[3] *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

[4] *State v. Ely, ante* p. 147, 841 N.W.2d 216 (2014).

[5] *Id.*

within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), and rule 404(2), and the trial court's decision will not be reversed on appeal absent an abuse of discretion.[6]

ANALYSIS

INTERROGATION

Susan argues that the district court erred in not suppressing her statements made from 3:43 to 4 a.m. and her statements made after 4:18 a.m. She argues that the statements were obtained in violation of her *Miranda* rights.

[5,6] The *Miranda* Court adopted a set of prophylactic measures to protect suspects from modern custodial interrogation techniques.[7] The safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.[8] The safeguards include the familiar *Miranda* advisements of the right to remain silent and the right to have an attorney present at questioning.[9] If the suspect indicates that he or she wishes to remain silent or that he or she wants an attorney, the interrogation must cease.[10]

[7] In *Edwards v. Arizona*,[11] the U.S. Supreme Court held that not only must the interrogation cease when a suspect invokes his or her right to counsel but also that the suspect "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." This second layer of protections ensures that police will not take advantage of the coercive pressures inherent in custodial interrogation by repeatedly

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[6] *Id.*

[7] See *Miranda v. Arizona*, *supra* note 2.

[8] *State v. Bormann*, 279 Neb. 320, 777 N.W.2d 829 (2010).

[9] See *Miranda v. Arizona*, *supra* note 2.

[10] *Id.*

[11] *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981).

questioning a suspect, who has requested counsel, until the suspect submits to questioning.[12] It ensures that the suspect was not pressured by the police to change his mind on his invocation for counsel.[13]

Edwards is inapplicable if the suspect initiated the post-invocation discussion with the authorities.[14] As the *Edwards* Court explained:

> [W]e do not hold or imply that [the suspect] was powerless to countermand his election or that the authorities could in no event use any incriminating statements made by [him] prior to his having access to counsel. Had [the suspect] initiated the meeting . . . nothing in the Fifth and Fourteenth Amendments would prohibit the police from merely listening to his voluntary, volunteered statements and using them against him at the trial. The Fifth Amendment right identified in *Miranda* is the right to have counsel present at any custodial interrogation. Absent such interrogation, there would have been no infringement of the right that [the suspect] invoked and there would be no occasion to determine whether there had been a valid waiver. *Rhode Island v. Innis*,[15] makes this sufficiently clear.[16]

[8,9] The *Edwards* rationale recognizes the value of voluntary statements. "Voluntary confessions are not merely 'a proper element in law enforcement,' . . . they are an 'unmitigated good,' . . . '"essential to society's compelling interest in finding, convicting, and punishing those who violate the law."'. . ."[17] Thus, "[v]olunteered statements of any kind are

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[12] See *Maryland v. Shatzer*, 559 U.S. 98, 130 S. Ct. 1213, 175 L. Ed. 2d 1045 (2010).

[13] *Dorsey v. U.S.*, 60 A.3d 1171 (D.C. 2013).

[14] See, e.g., *Minnick v. Mississippi*, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990); *Arizona v. Roberson*, 486 U.S. 675, 108 S. Ct. 2093, 100 L. Ed. 2d 704 (1988); *Edwards v. Arizona*, *supra* note 11.

[15] *Rhode Island v. Innis*, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980).

[16] *Edwards v. Arizona*, *supra* note 11, 451 U.S. at 485-86.

[17] *Maryland v. Shatzer*, *supra* note 12, 559 U.S. at 108 (citations omitted).

not barred by the Fifth Amendment and their admissibility is not affected by our holding [in *Miranda*].”[18]

STATEMENTS MADE BETWEEN 3:43 TO 4 A.M.

Susan argues that her statements from 3:43 to 4 a.m. should have been suppressed, because she unambiguously invoked her right to cut off questioning. We agree with Susan that her statements from 3:43 to 4 a.m. should have been suppressed, but conclude that the district court’s error was harmless.

As mentioned, the safeguards of *Miranda* “‘assure that the individual’s right to choose between speech and silence remains unfettered throughout the interrogation process.’”[19] The suspect has the right to “control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation.”[20]

[10,11] In considering whether a suspect has clearly invoked the right to remain silent, we review not only the words of the criminal defendant, but also the context of the invocation.[21] Relevant circumstances include the words spoken by the defendant and the interrogating officer, the officer’s response to the suspect’s words, the speech patterns of the suspect, the content of the interrogation, the demeanor and tone of the interrogating officer, the suspect’s behavior during questioning, the point at which the suspect allegedly invoked the right to remain silent, and who was present during the interrogation.[22] A court might also consider the questions that drew the statement, as well as the officer’s response to the statement.[23]

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[18] *Miranda v. Arizona*, *supra* note 2, 384 U.S. at 478.

[19] *Connecticut v. Barrett*, 479 U.S. 523, 528, 107 S. Ct. 828, 93 L. Ed. 2d 920 (1987) (emphasis omitted) (quoting *Miranda v. Arizona*, *supra* note 2).

[20] *Michigan v. Mosley*, 423 U.S. 96, 103-04, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975).

[21] *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009).

[22] *Id.*

[23] *Id.*

We find that a reasonable officer presented with the circumstances of this interrogation would have understood Susan's statements at 3:43 a.m. that she was done, tired, and wanted to go to sleep as an invocation of her right to remain silent. We have held very similar statements, such as "'I'm done,'" to be unambiguous invocations.[24] Not only should a reasonable officer have understood Susan's statement to be an invocation of the right to remain silent, it appears that Farber understood the statement this way. After the invocation, Farber interrupted Susan and began to ask questions for his coroner's report. Farber's actions indicate an understanding that Susan was done talking about the investigation. But, after changing the topic of conversation briefly, Farber continued the interrogation. *Miranda* prohibits officers from simply persisting after a suspect invokes his or her right to remain silent.[25]

[12] Therefore, the district court's failure to suppress Susan's statements from 3:43 to 4 a.m. was a constitutional error.[26] But even constitutional error does not automatically require reversal of a conviction if that error was a trial error and not a structural defect.[27] The admission of an improperly obtained statement is a trial error, and so its erroneous admission is subject to harmless error analysis.[28]

[13,14] To conduct harmless error review, we look to the entire record and view the erroneously admitted evidence relative to the rest of the untainted, relevant evidence of guilt.[29] Our review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict

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[24] *Id.* at 69, 760 N.W.2d at 61.

[25] *State v. Rogers*, *supra* note 21.

[26] See *State v. Bauldwin*, *supra* note 3.

[27] See, *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991); *State v. Bauldwin*, *supra* note 3.

[28] *Id.*

[29] See *State v. Freemont*, 284 Neb. 179, 817 N.W.2d 277 (2012).

rendered in the questioned trial was surely unattributable to the error.[30]

We begin by finding that the untainted, relevant evidence strongly supports Susan's guilt. Overwhelming evidence of guilt alone is not sufficient to find harmless error, but it is relevant in determining whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.[31] The State's evidence demonstrated that Susan's story that Tom was beaten by his alleged mistress was completely fabricated. The evidence presented at trial showed that Tom was home that week and never left for South Dakota.

Bauer, Tom's boss, testified that Susan's and Tom's vehicles were at the DeJong home the day before Tom allegedly returned from South Dakota. Bauer testified that Tom had called in sick to work on that Wednesday and Thursday. Cell phone records confirm that those calls "pinged" off cell towers near the DeJong home and not in South Dakota. Susan's son, James, testified that he believed Tom was at the DeJong home on Thursday because of a telephone conversation he had with Susan that day. At trial, Susan presented no evidence that Tom had actually gone to South Dakota. Additionally, the alleged mistress testified that she and Tom never had an extramarital relationship, that Tom did not visit her that week, and that she did not cause his injuries.

Other evidence demonstrates Susan's motive for killing Tom. During her hospital interview, Susan ranted about Tom and his "whore." Susan alleged that Tom and that "whore" used drugs and molested children. Susan blamed the "whore" for ruining her relationship with Tom. Additionally, the State introduced Susan's Internet instant messages in which Susan stated that she "hate[d]" Tom, that she wished he were dead, and that she was "looking at getting rid of" him.

The evidence at trial also showed that Susan may have been the only person with the opportunity to inflict Tom's injuries. The medical testimony offered at trial established that many of Tom's injuries were inflicted well within 72 hours of his

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[30] *State v. Bauldwin*, *supra* note 3.

[31] *Id.*

death. That indicates that Tom's injuries may have occurred any time after Tuesday. The evidence indicates that during those periods of time, Tom was at home with Susan. There was no evidence presented, other than Susan's fabricated statements about South Dakota, that Tom left the home on Wednesday, Thursday, or Friday. There was no evidence presented that someone other than Susan had spent time with Tom after Tuesday.

The physical evidence also supported Susan's guilt. All of the medical experts testified that Tom was severely assaulted and that his injuries were not caused naturally or by accident. His death was caused by blunt force trauma. Tom had defensive wounds on his hands and arms. Droplets of blood were found throughout the house, including on Susan's clothes. A red bag containing women's clothes, men's pajamas, Tom's wallet, and two hammers and a blue bag containing a computer, a lug wrench, and a cell phone were found in Susan's truck. Thomsen, the pathologist who performed Tom's autopsy, testified that the injuries to Tom's body were caused by some type of instrument and that the instrument could have been a hammer. After the interrogation, photographs and testimony established that Susan had bruises and sores on her palms that would be consistent with swinging a hammer. The bloodstained blue hammer recovered in Susan's truck had a mixture of Tom's and Susan's DNA. Susan's DNA was found on the handle. Tom's DNA was found on the head of the hammer.

[15] Again, overwhelming evidence of guilt alone does not establish harmless error.[32] However, the erroneous admission of evidence is harmless error and does not require reversal if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact.[33]

After reviewing the interrogation, we find that the statements made by Susan from 3:43 to 4 a.m. are almost entirely cumulative to her properly admitted statements made to Ground at Bryan hospital just 5 hours prior to being interrogated. Susan

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[32] *Id.*

[33] *State v. Ildefonso*, 262 Neb. 672, 634 N.W.2d 252 (2001).

concedes this with one exception. Susan notes in her brief that during this period of interrogation, she admitted that she had lied to the police in Minnesota. Susan stated that she was arrested in Minnesota because she told the Minnesota police officer that Tom had not slapped her, when in fact he had.

We first emphasize that this statement was not a confession. It was to some degree incriminating, because the jury was informed that Susan was arrested for an unknown offense. But the jury would not know from her interrogation statement why she was arrested and under what circumstances. The statement alone did not inform the jury that Susan had slapped Tom.

Additionally, any inference that Susan was arrested for assaulting Tom in Minnesota is cumulative to properly admitted evidence. In her statements made after 4:18 a.m., Susan mentioned the incident in Minnesota and told Ground that "I slapped him in Fairbury." Although her interrogation statement after 4:18 a.m. is not crystal clear as to exactly what happened in Minnesota, it does strongly mitigate the prejudice caused by the improper admission of her statements.

Further, the jury could infer from the relevant, untainted evidence that Susan had on different occasions assaulted Tom prior to the assault that resulted in his death. Susan, in her hospital statements, told McClure and Ground that Tom had been previously beaten by the "whore." This is consistent with Bauer's testimony, which was not objected to at trial or on appeal, that Tom would come to work every 2 to 3 weeks visibly sore with facial injuries, including black eyes and split lips. From this evidence, it is clear that Tom had been often assaulted prior to his death. When this evidence is considered with the evidence that Susan had lied about Tom's whereabouts before his murder, the alleged mistress' testimony that she had never harmed Tom, and Bauer's testimony that Tom had not suffered the injuries at work, a jury could reasonably infer that Susan was the one who had previously assaulted Tom on multiple occasions.

Therefore, there is no reason to believe that Susan's statements from 3:43 to 4 a.m. materially influenced the jury's verdicts. Susan's statements were cumulative and very minor relative to the rest of the untainted record. The admission by

the district court of Susan's interrogation statements from 3:43 to 4 a.m. was harmless error.

Statements Made After 4:18 a.m.

Susan argues that her statements made after 4:18 a.m. should have been suppressed. Susan first argues that the statements made after 4:18 a.m. were involuntary, because it was a continuation of the ongoing interrogation. Second, Susan argues that she continued to provide answers only because the investigators had previously elicited inadmissible statements from 3:43 to 4:18 a.m. and that therefore, "the cat was already out of the bag."[34] We reject both of Susan's arguments and find that her statements after 4:18 a.m. were not required to be suppressed.

First, we find that at 4:18 a.m., Susan clearly invoked her right to end the questioning under her right to counsel when she stated, "I want a lawyer, please. I'm tired of this." The State concedes that this was a proper invocation for her right to an attorney.

The question to be answered is whether Susan voluntarily initiated the conversation after her 4:18 a.m. invocation. We find that she did. After Susan's invocation, both Farber and Ground ended the interrogation and left the room. Susan laid her head down for 30 seconds, then stood and grabbed her keys. She opened the door to the interrogation room to leave for a cigarette. Susan could not leave because she was in custody. Ground told Susan to sit back down, and Ground went to close the interrogation room's door. Without a question being asked, Susan began talking. Ground paused as she closed the door, reopened the door, and took a seat in a chair across from Susan. None of the actions of Ground can be construed as initiating the conversation. She simply told Susan to take a seat and then proceeded to leave. Only after Susan said "I'm sorry" to Ground, did Ground reenter the room.

Because Susan clearly initiated the conversation after her invocation for counsel, the second layer of protection outlined

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[34] Brief for appellant at 62.

in *Edwards* is inapplicable. The police were "merely listening to [Susan's] voluntary, volunteered statements and using them against [her] at the trial."[35]

Additionally, the record establishes that at no time after Susan initiated the conversation did another interrogation begin. Interrogation includes not only express questioning, but also any words or actions that the police should have known were reasonably likely to elicit an incriminating response.[36] After 4:18 a.m., Ground did not ask Susan a question and Ground did not employ any form of modern interrogation techniques.

In interpreting *Rhode Island v. Innis*,[37] this court has stated that an objective standard is applied to determine whether there is interrogation within the meaning of *Miranda* and *Edwards*.[38] The question to be answered is: "'Would a reasonable and disinterested person conclude that police conduct, directed to a suspect or defendant in custody, would likely elicit an incriminating response from that suspect or defendant? . . . If the answer is "yes," there is interrogation . . . .'"[39]

From the interrogation video and transcript, we find the answer to be no. Susan's statements made after 4:18 a.m. were not made during an interrogation. Ground's actions did not elicit the incriminating responses. She did not threaten or persuade Susan into talking. Ground simply sat down at the interrogation table after Susan began speaking. "'[I]nterrogation occurs when a person is placed under a compulsion to speak.'"[40] Susan was not compelled to talk by Ground's actions or statements; Susan did so voluntarily. There was no interrogation after 4:18 a.m.

[16,17] Susan argues that she was compelled to talk because "the cat was already out of the bag" due to her previous

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[35] See *Edwards v. Arizona*, *supra* note 11, 451 U.S. at 485.

[36] *Rhode Island v. Innis*, *supra* note 15.

[37] *Id.*

[38] *State v. Bormann*, *supra* note 8.

[39] *Id.* at 327, 777 N.W.2d at 836.

[40] *Id.* at 328, 777 N.W.2d at 836.

inadmissible statements. We disagree. The U.S. Supreme Court has stated that "after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good."[41] But the fact that the defendant has shared a secret in an inadmissible statement does not preclude the defendant from later waiving his or her constitutional rights after the conditions that induced the original statement have been removed.[42] The U.S. Supreme Court has explicitly rejected any "rigid rule" that suppresses the subsequent statement and has instead directed courts to focus on the voluntariness of any subsequent statement.[43] To do so, a court must evaluate the "entire course of police conduct" and the surrounding circumstances, including whether or not the conditions that made the first statement inadmissible had been removed.[44]

In *Missouri v. Seibert*,[45] the surrounding conditions made the subsequent statement inadmissible. In that case, the police purposefully did not give the suspect a warning of his rights to silence or counsel until the inadmissible interrogation had produced a confession.[46] Subsequent to the confession, the officer then gave the suspect his *Miranda* rights and then reinterrogated him until he confessed again. The U.S. Supreme Court held that the subsequent confession repeated after the *Miranda* warnings were given was inadmissible.[47] The plurality opinion reasoned that "[u]pon hearing warnings only in the

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[41] *United States v. Bayer*, 331 U.S. 532, 540, 67 S. Ct. 1394, 91 L. Ed. 1654 (1947).

[42] *Oregon v. Elstad*, 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985); *United States v. Bayer, supra* note 41.

[43] *Oregon v. Elstad, supra* note 42, 470 U.S. at 318.

[44] *Id.*

[45] *Missouri v. Seibert*, 542 U.S. 600, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004).

[46] See *id.*

[47] See *id.*

aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again."[48] The plurality surmised that the suspect would be perplexed as to why his or her rights were being discussed at that point.[49] Further, telling the suspect that what he or she says will be used against them creates an inference that the prior statements made by the suspect will be used against them. Thus, the actions of the officer are "likely to mislead and 'depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.'"[50] In such a situation, the unwarned and warned interrogations blended into one "continuum."[51]

[18] But in Justice Kennedy's concurring opinion to *Seibert*, he reiterated that subsequent statements can be admissible if the "continuum" was broken by

> [c]urative measures . . . designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver. For example, a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning may suffice in most circumstances, as it allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn.[52]

And in *Bobby v. Dixon*,[53] the Court accordingly held that the "continuum" between two of the interrogations had been broken and that therefore, the subsequent confession was admissible. Archie Dixon was arrested for forgery and was interrogated

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[48] *Id.*, 542 U.S. at 613.

[49] See *id.*

[50] *Id.*, 542 U.S. at 613-14 (quoting *Moran v. Burbine*, 475 U.S. 412, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986)).

[51] *Id.*, 542 U.S. at 617.

[52] *Id.*, 542 U.S. at 622 (Kennedy, J., concurring).

[53] *Bobby v. Dixon*, 565 U.S. 23, 132 S. Ct. 26, 181 L. Ed. 2d 328 (2011).

without receiving *Miranda* warnings. During this unwarned interrogation, Dixon readily admitted to obtaining an identification card from a murder victim and forging checks with the murder victim's signature. Dixon was booked for forgery and sent to a correctional facility.

Four hours later, Dixon was transported back to the police station. Prior to any police questioning, Dixon told the police, "'I talked to my attorney, and I want to tell you what happened.'"[54] The police read Dixon his *Miranda* rights, and Dixon signed a waiver. The interrogation began, and Dixon admitted to the murder but attempted to pin the blame on his accomplice.

The U.S. Supreme Court held that the admission of Dixon's murder confession was consistent with its precedent.[55] The Court noted that this was not the sort of two-step interrogation procedure condemned in *Seibert*.[56] It found that given all the circumstances, Dixon had a real choice about giving an admissible statement.[57] Four hours had passed between Dixon's unwarned interrogation and the receipt of his *Miranda* rights, he claimed to have spoken to his lawyer, and he had learned that the police had additional physical evidence.[58] As the Court stated, "this significant break in time and dramatic change in circumstances created 'a new and distinct experience,' ensuring that Dixon's prior, unwarned interrogation did not undermine the effectiveness of the *Miranda* warnings he received before confessing to [the victim's] murder."[59]

The U.S. Supreme Court reinstated the opinion of the Ohio Supreme Court and noted that its holding did not excuse the officer's decision to not give *Miranda* warnings before the first interrogation. But, the Court observed, the Ohio courts had already properly recognized the officer's failure and had

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[54] *Id.*, 565 U.S. at 26.

[55] See *Bobby v. Dixon*, *supra* note 53.

[56] See, *id.*; *Missouri v. Seibert*, *supra* note 45.

[57] See *Bobby v. Dixon*, *supra* note 53.

[58] *Id.*

[59] *Id.*, 565 U.S. at 32 (quoting *Missouri v. Seibert*, *supra* note 45).

remedied it by excluding Dixon's forgery confession and the attendant statements.

Here, we find that the circumstances in the interrogation room had changed dramatically after Susan's third invocation and that the change gave Susan a real opportunity to make a voluntary statement. In coming to our holding, we evaluated the entire course of police conduct and the surrounding circumstances.[60] This was not a two-step interrogation technique as in *Seibert*. Susan was made fully aware of her rights before any statements were made. However, the police did ignore Susan's first two invocations and Farber continued to question Susan for an additional 35 minutes. During those 35 minutes, the interrogation did become more intense and Susan did make incriminating statements. Only when Susan requested an attorney did the interrogation stop and Farber and Ground left the room.

We have established that Farber had previously violated Susan's right to cut off questioning, and we do not excuse his conduct. But such conduct resulted in the district court's suppressing Susan's interrogation statements from 4 to 4:18 a.m. Although the district court did not suppress Susan's statements from 3:43 a.m., we have found that the admission of those statements was harmless. As in *Dixon*, the prior *Miranda* violations have been remedied.

The prior *Miranda* violations do not warrant suppression of Susan's statements made after 4:18 a.m. The circumstances of the entire situation indicate that the effectiveness of the *Miranda* warnings given to Susan was restored when Farber and Ground ended the interrogation upon Susan's request for an attorney. The actions of the investigators reasonably demonstrated to Susan that she had properly invoked her right to an attorney and that the interrogation was over. Susan faced "'a new and distinct experience.'"[61] After her two prior invocations, the questioning did not even momentarily stop. In both instances, the questioning continued and Susan, without further verbal resistance, continued to answer. Contrary to

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[60] See *Oregon v. Elstad*, *supra* note 42.

[61] See *Bobby v. Dixon*, *supra* note 53, 565 U.S. at 32.

those experiences, Susan faced a new experience after her invocation for an attorney. She was no longer subject to modern interrogation techniques. The investigators stood and left the room, indicating a clear intention to end the interrogation. Susan was left alone.

And unlike in *Elstad* and *Seibert*, Susan initiated the second conversation. She was never again subjected to questioning. Susan made the decision to reinitiate the dialog with the investigators, and she was not explicitly attempting to clarify or explain her previous inadmissible statements. Susan, for whatever reason, wanted to tell more of her story. As the *Edwards* Court noted:

> It is not unusual for a person in custody who previously has expressed an unwillingness to talk or a desire to have a lawyer, to change his mind and even welcome an opportunity to talk. Nothing in the Constitution erects obstacles that preclude police from ascertaining whether a suspect has reconsidered his original decision. As Justice White has observed, this Court consistently has "rejected any paternalistic rule protecting a defendant from his intelligent and voluntary decisions about his own criminal case."[62]

Therefore, we affirm the district court's determination that Susan's prior statements, which were made after she invoked her right to end questioning, did not render inadmissible her statements made after her interrogation ended. We find that Susan's statements after 4:18 a.m. were initiated by Susan and were not the product of interrogation. Although the cat may have been, in some limited respects, out of the bag, the fact that the interrogation ended and the officers left the room had significantly changed the circumstances of the interrogation process and gave Susan a "real choice about giving an admissible statement."[63] Susan's statements after 4:18 a.m. were voluntary.

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[62] *Edwards v. Arizona*, *supra* note 11, 451 U.S. at 490-91 (citing *Michigan v. Mosley*, *supra* note 20 (White, J., concurring in result)).

[63] *Missouri v. Seibert*, *supra* note 45, 542 U.S. at 612.

EVIDENCE ADMITTED AT RULE 404 HEARING

Susan argues that the three prior bad acts admitted by the district court should have been suppressed. For purposes of this appeal, we are assuming, without deciding, that the admissions were in error. However, we find the erroneous admissions of the evidence to be harmless.

The State used the three prior bad acts to help link Susan to the murder by demonstrating her prior assaults on Tom. With all three prior bad acts, the testimony established that Tom had injuries similar to the injuries which caused his death and that the evidence implied the prior injuries were caused by Susan. The first incident was the Minnesota police officer's testifying to facial injuries suffered by Tom and the subsequent arrest of Susan. For the other incidents, the testimony from James and Sharon described only the injuries they witnessed on Tom and described Susan's explanations for the injuries. Neither James nor Sharon directly stated that Susan caused the injuries. The district court admitted the Minnesota event for the limited purposes of motive, intent, identity of perpetrator, and absence of mistake. The other two incidents were admitted for the limited purposes of intent, identity, and absence of mistake.

We begin our harmless error analysis by again noting that the untainted, relevant evidence strongly supports Susan's guilt. As already discussed, the evidence established that Susan had lied about Tom's going to South Dakota. The evidence established that Tom was assaulted in the 72 hours prior to his death and that during those 72 hours, Tom was at home with Susan. The DNA found on the hammer was consistent with Susan's swinging the hammer and bludgeoning Tom with the hammerhead. The medical experts agreed that Tom was murdered by blunt force trauma. The only other suggested suspect, Tom's alleged mistress, testified that she did not see Tom that week and that she did not harm Tom. This evidence, when considered with the instant messages and interrogation statements about self-defense, establishes Susan's guilt.

But strong evidence of guilt alone is not enough. We also find that for all three prior bad acts, there is cumulative

evidence establishing that Tom was often injured prior to his death and that the likely perpetrator was Susan. In the properly admitted statements after 4:18 a.m., Susan admitted that she had slapped Tom in Minnesota. Susan also stated that Tom had been previously beaten by the "whore." Susan also told investigators that Tom bruised easily and that she did not, implying that she had previously assaulted him. Susan explained to Ground that she was acting in self-defense, again indicating that Susan had assaulted Tom. Bauer testified that Tom would come to work visibly sore every 2 to 3 weeks with facial injuries, including black eyes and split lips. When considered with the evidence that Susan had lied about Tom's whereabouts to investigators and that she was angry at Tom for allegedly cheating on her, a jury could infer that Susan may have also been lying about Tom's prior injuries being the result of work or from beatings by the alleged mistress. From this evidence alone, the jury could infer that Tom's prior injuries were inflicted by Susan.

Additionally, the untainted evidence not only provided evidence of guilt but also established Susan's motive, her intent, her identity as the killer, and the absence of mistake in Tom's death. The evidence demonstrates that Susan was distraught over her belief that Tom was cheating and that she had the intent to kill him. The physical evidence also ties Susan directly to the possible murder weapon and places her as the only person with Tom the days before his death. The properly admitted testimony from Bauer, the alleged mistress, and the medical experts also establishes that Tom's injuries were not caused by mistake or accident. Bauer established that Tom was often injured but that Tom was not injured at work. The alleged mistress testified that she has never harmed Tom and had no reason to do so. The medical experts testified that Tom's injuries were not caused by a car accident or caused by normal activities at work. Even Susan's expert pathologist testified that Tom's death was the result of an assault. The jury had ample evidence that Tom's death was not a mistake, that Susan was the murderer, and that she had the motive and intent to commit the crime.

When viewed in relation to the whole record, the evidence erroneously admitted at the rule 404 hearing was insignificant. This evidence did not provide a crucial link to allow the State to make its case. In that sense, the evidence admitted at the rule 404 hearing was largely unnecessary. Thus, we hold that the erroneously admitted evidence was insignificant and did not materially influence the jury's verdicts. Any error was harmless.

CONCLUSION

The district court did not err in admitting Susan's statements made after 4:18 a.m. into evidence. Although the district court erred by admitting Susan's statements from 3:43 to 4 a.m. and, assuming without deciding, erred by admitting all three prior bad acts, we find that all such errors were harmless. The convictions and sentences are affirmed.

AFFIRMED.

HEAVICAN, C.J., concurring.

I concur in the decision of the court affirming Susan's convictions and sentences. But I write separately because I disagree with the majority's conclusion that Susan's statements from 3:43 to 4 a.m. should have been suppressed. In my view, Susan's statements that she was done, tired, and wanted to go to sleep did not unambiguously invoke her right to remain silent.

In support of its conclusion that Susan's statements should have been suppressed, the majority cites to *State v. Rogers*.[1] In *Rogers*, this court held that a defendant's statement that she was "'done'" was sufficient to unambiguously invoke her right to remain silent.[2] But I dissented from this court's decision in *Rogers*, because I did not believe that the right to remain silent had been unambiguously invoked. I continue to believe that *Rogers* was wrongly decided and that the facts did not support a conclusion that the defendant had invoked her right to remain silent.

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[1] *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009).

[2] *Id.* at 69, 760 N.W.2d at 61.

In considering whether a suspect has clearly invoked the right to remain silent, we review not only the words of the criminal defendant, but also the context of the invocation. Relevant circumstances include the words spoken by the defendant and the interrogating officer, the officer's response to the suspect's words, the speech patterns of the suspect, the content of the interrogation, the demeanor and tone of the interrogating officer, the suspect's behavior during questioning, the point at which the suspect allegedly invoked the right to remain silent, and who was present during the interrogation. A court might also consider the questions that drew the statement, as well as the officer's response to the statement.[3]

Of course, as this court noted in *Rogers*, a defendant's statement that he or she is "done," taken together with the surrounding circumstances, has been held by some courts to unambiguously invoke that defendant's right to remain silent. But this court and other courts, presented with different circumstances, have found to the contrary.[4] As this court noted in *State v. Schroeder*,[5] "[w]e have never held that any utterance of 'I'm done,' no matter what the surrounding circumstances or other statements, will be construed as cutting off all further questioning." Rather, the focus must be on those surrounding circumstances.

And in analyzing those circumstances in this case, I do not agree with the majority that Susan invoked her right to remain silent. Susan indicated that she was tired and done. She then began crying. On these facts, a reasonable officer could have assumed that she was frustrated, tired, and needed a break, but that she was not yet done answering questions. Farber was

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[3] *Id.*

[4] See, *State v. Thomas*, 267 Neb. 339, 673 N.W.2d 897 (2004), *abrogated, Rogers, supra* note 1; *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003), *abrogated, Rogers, supra* note 1. See, also, *People v. Lowin*, 36 A.D.3d 1153, 827 N.Y.S.2d 782 (2007); *State v. Saeger*, No. 2009AP2133-CR, 2010 WL 3155264 (Wis. App. Aug. 11, 2010) (unpublished disposition listed in table at 329 Wis. 2d 711, 790 N.W.2d 543 (2010)).

[5] *State v. Schroeder*, 279 Neb. 199, 218, 777 N.W.2d 793, 809 (2010).

permitted to clarify Susan's wishes,[6] which he did by asking whether she had questions for him. And when he so inquired, Susan indicated that she did, asking about the autopsy. Susan then willingly answered questions posed by Farber in connection with the coroner's report for the autopsy.

For the above reasons, I would conclude that Susan's statements from 3:43 to 4 a.m. did not need to be suppressed, because Susan did not unambiguously invoke her right to remain silent.

[6] See *Berghuis v. Thompkins*, 560 U.S. 370, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010).

STATE OF NEBRASKA, APPELLEE, V.
MARQUS J. PATTON, APPELLANT.
845 N.W.2d 572

Filed April 11, 2014. No. S-13-105.

1. **Constitutional Law: Witnesses: Appeal and Error.** An appellate court reviews de novo a trial court's determination of the protections afforded by the Confrontation Clause of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution and reviews the underlying factual determinations for clear error.
2. **Constitutional Law: Due Process.** The determination of whether procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.
3. **Judgments: Appeal and Error.** When issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
4. **Rules of Evidence: Appeal and Error.** The exercise of judicial discretion is implicit in the determinations of relevancy under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), and a trial court's decisions regarding them will not be reversed absent an abuse of discretion.
5. **Rules of Evidence: Other Acts: Appeal and Error.** It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2012), and the trial court's decision will not be reversed absent an abuse of discretion.
6. **Criminal Law: Constitutional Law: Trial: Witnesses.** The right of a person accused of a crime to confront the witnesses against him or her is a fundamental

right guaranteed by the 6th Amendment to the U.S. Constitution, as incorporated in the 14th Amendment, as well as by article I, § 11, of the Nebraska Constitution.

7. **Constitutional Law: Trial: Witnesses.** The functional purpose of the Confrontation Clause is to ensure the integrity of the factfinding process through the provision of an opportunity for effective cross-examination.
8. **Constitutional Law: Trial: Witnesses: Words and Phrases.** The right to confrontation means more than merely being allowed to confront the witness physically. But the right is not unlimited, and only guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way and to whatever extent the defense may wish.
9. **Trial: Testimony.** When the object of the cross-examination is to collaterally ascertain the accuracy or credibility of the witness, the scope of the inquiry is ordinarily subject to the discretion of the trial court.
10. **Constitutional Law: Trial: Juries: Witnesses.** An accused's constitutional right of confrontation is violated when either (1) he or she is absolutely prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, or (2) a reasonable jury would have received a significantly different impression of the witnesses' credibility had counsel been permitted to pursue his or her proposed line of cross-examination.
11. **Criminal Law: Due Process: Witnesses.** The existence of an agreement to testify by a witness under threats or promises of leniency made by the prosecutor is relevant to the credibility of such witness, and failure to bring that to the attention of the jury denies the defendant due process of law.
12. **Criminal Law: Witnesses.** An expectation of leniency on the part of a witness, absent evidence of any expressed or implied agreement, need not be revealed to the jury.
13. **Records: Appeal and Error.** A party's brief may not expand the evidentiary record.
14. **Evidence: Records: Appeal and Error.** A bill of exceptions is the only vehicle for bringing evidence before an appellate court; evidence which is not made a part of the bill of exceptions may not be considered.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

STEPHAN, J.

A jury convicted Marqus J. Patton of first degree murder and use of a deadly weapon to commit a felony as a result of his involvement in a fatal shooting which occurred during a home invasion robbery. Two key prosecution witnesses were participants in the crime, and another was the victim's former girlfriend. On appeal, Patton contends the trial court erroneously restricted his cross-examination of these witnesses and otherwise impeded his efforts to impeach them in violation of his constitutional rights of confrontation and due process of law. We conclude there was no reversible error and affirm.

I. BACKGROUND

On July 6, 2011, Patton was at the home of his friend Nicholas Ely. Also present were Ryan Elseman and Emily G., a juvenile. The group decided to go swimming, and Drake Northrop arrived at around 11:45 a.m. to give them a ride. After setting out in Northrop's vehicle, they decided to stop to buy marijuana from Kristopher Winters before going swimming.

Emily directed the group to Winters' home, where she had been before. She testified that while they were in the car, she heard the others discussing a plan to rob Winters. Northrop testified that it was Ely and Elseman who devised the plan to rob Winters and recalled them saying it would be an easy "lick," a slang term for robbery. Northrop further testified that both he and Patton agreed with the plan.

Northrop parked the car around the corner from Winters' home. Emily went to the door alone and agreed to send a text message to the others when she was inside. While near Winters' home, Emily encountered Winters' friend Eric Brusha. Brusha called Winters on his cell phone, and Winters let Emily and Brusha in the house. Emily then sent a text message to Elseman stating that she was inside.

A few minutes later, Ely, Elseman, Patton, and Northrop entered Winters' home. Elseman and Patton both carried firearms. When Elseman held his weapon up, Winters rushed at Elseman. Patton struck Winters as he fought with Elseman, and then Winters struck Patton with a chair. Patton yelled for

Elseman to shoot, and a gunshot struck Winters in the neck, causing his death. As Winters fell, Ely, Elseman, Patton, and Northrop ran to the parked vehicle. Emily was left behind.

Ely, Elseman, Patton, and Northrop left the scene in Northrop's vehicle. Elseman sent Emily a text message instructing her to go to a nearby restaurant where someone would pick her up. The others went to Patton's apartment. On the way there, Patton stated that a bullet must have grazed him and showed the others a bloody injury on his stomach. DNA testing later showed blood found in Northrop's car was a match for Patton.

Meanwhile, Brusha called the 911 emergency dispatch service and was present at the scene when investigators arrived. An investigating officer escorted Brusha to the police station for an interview. As they drove, Brusha saw Emily walking and identified her as a participant in the incident. Emily was detained and taken to the police station.

Emily had blood spatters on her shirt, leg, and shoes. She initially was uncooperative, but eventually told investigators what happened and showed them where Ely lived. Patton was arrested on the morning of July 8, 2011. Northrop was arrested on July 14. Northrop originally denied involvement, but eventually confessed and implicated Ely, Elseman, Patton, and Emily.

Patton, Emily, and Northrop were all charged with first degree murder. Emily and Northrop agreed to testify against Patton, and many of the facts summarized here came into evidence through their testimony. In addition, Cassandra Moyers, Winters' former girlfriend, testified that 2 days before the robbery, she had been at a party with Ely, Elseman, Patton, and Northrop. At that time, Patton asked Moyers to help him devise a plan to rob Winters, who was a known drug dealer.

Patton was convicted and sentenced to life imprisonment on the murder count and to 5 to 15 years' imprisonment for use of a deadly weapon to commit a felony. He filed this timely appeal. Additional facts will be set forth in our discussion of Patton's specific assignments of error.

II. ASSIGNMENTS OF ERROR

Patton assigns, restated, renumbered, and consolidated, (1) that the trial court violated his constitutional right to confront the witnesses against him by limiting his cross-examination of Emily, Northrop, and Moyers; (2) that the trial court violated his due process rights by precluding him from presenting evidence that the State had made tacit plea agreements with Emily and Northrop; (3) that the State violated his due process rights by failing to disclose it made such tacit plea agreements; and (4) that the trial court erred in refusing to receive evidence of prior robberies committed by Emily and Elseman.

III. STANDARD OF REVIEW

[1-3] An appellate court reviews de novo a trial court's determination of the protections afforded by the Confrontation Clause of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution and reviews the underlying factual determinations for clear error.[1] The determination of whether procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.[2] When issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.[3]

[4,5] The exercise of judicial discretion is implicit in the determinations of relevancy under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), and a trial court's decisions regarding them will not be reversed absent an abuse of discretion.[4] It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum.

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[1] *State v. Kitt*, 284 Neb. 611, 823 N.W.2d 175 (2012). See, also, *State v. Sorensen*, 283 Neb. 932, 814 N.W.2d 371 (2012).

[2] *State v. Watson*, 285 Neb. 497, 827 N.W.2d 507 (2013).

[3] *State v. Landera*, 285 Neb. 243, 826 N.W.2d 570 (2013).

[4] *State v. Taylor*, 282 Neb. 297, 803 N.W.2d 746 (2011).

Supp. 2012), and the trial court's decision will not be reversed absent an abuse of discretion.[5]

IV. ANALYSIS

1. Limitation of Cross-Examination

Patton contends the trial court violated his Sixth Amendment right to confrontation when it limited his ability to cross-examine three prosecution witnesses. Specifically, he argues that the district court erred in restricting him from (1) cross-examining Emily and Northrop about what sentence they hoped to avoid by testifying against him and (2) questioning Moyers about the fact that she believed Winters' family blamed her for his death.

[6-10] The right of a person accused of a crime to confront the witnesses against him or her is a fundamental right guaranteed by the 6th Amendment to the U.S. Constitution, as incorporated in the 14th Amendment, as well as by article I, § 11, of the Nebraska Constitution.[6] The functional purpose of the Confrontation Clause is to ensure the integrity of the factfinding process through the provision of an opportunity for effective cross-examination.[7] The right to confrontation means more than merely being allowed to confront the witness physically.[8] But the right is not unlimited, and only guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way and to whatever extent the defense may wish.[9] When the object of the cross-examination is to collaterally ascertain the accuracy or credibility of the witness, the scope of the inquiry

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[5] *State v. Collins*, 281 Neb. 927, 799 N.W.2d 693 (2011).

[6] *State v. Stark*, 272 Neb. 89, 718 N.W.2d 509 (2006); *State v. Johnson*, 255 Neb. 865, 587 N.W.2d 546 (1998).

[7] *State v. Stark*, *supra* note 6; *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000), *abrogated on other grounds*, *State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2006).

[8] *State v. Privat*, 251 Neb. 233, 556 N.W.2d 29 (1996).

[9] *Id.*, citing *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986).

is ordinarily subject to the discretion of the trial court.[10] An accused's constitutional right of confrontation is violated when either (1) he or she is absolutely prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, or (2) a reasonable jury would have received a significantly different impression of the witnesses' credibility had counsel been permitted to pursue his or her proposed line of cross-examination.[11]

(a) Cross-Examination of Emily and Northrop

Because there was limited physical evidence linking Patton to the murder, the testimony of both Emily and Northrop was an important part of the State's case against him. Prior to trial, the State filed a motion in limine to prevent Patton from asking either Emily or Northrop what penalty he or she was seeking to avoid by testifying against him. The trial court sustained the motion, reasoning that because Patton, Emily, and Northrop were all charged with first degree murder, allowing either Emily or Northrop to testify about the possible penalty for that crime would improperly alert the jury to the penalty Patton faced if convicted.

Patton was, however, permitted to cross-examine both Emily and Northrop generally, and rather extensively, about their decisions to testify against him. And both were also asked on direct examination about their decision to testify. Specifically, Emily, who was 15 years of age at the time of the murder, testified on direct examination that she was charged with first degree murder and that she had a "hope or an expectation" that by testifying, she would "get [her case] dropped down to juvenile." She explained, however, that she had not been "told that that is going to happen for sure."

On cross-examination, Emily admitted that she was "trying to save" herself and that to do that, she had to cooperate with

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[10] *State v. Privat*, *supra* note 8. See, also, *State v. Banks*, 278 Neb. 342, 771 N.W.2d 75 (2009); *State v. Stark*, *supra* note 6.

[11] *Id.*

the prosecution. She also admitted that she had told lies to protect herself when she was "in a corner." She again testified that she was charged with first degree murder and explained that she understood that because of the felony murder rule, whoever participates in a murder is charged with the murder. She also testified on cross-examination that it was her understanding that if her case were transferred to juvenile court, she would not go to prison and she would actually be "free and clear" on her 19th birthday. She testified that her desire to get her case transferred to juvenile court had been communicated to the prosecutor only via her testifying against Patton and the other defendants in the case. She admitted that "what happens" to her is the "most important thing that's going on" in her mind and that "[w]hat happens" to her "depends in large part [on] how" she testified.

Northrop testified on direct that he was currently incarcerated and was facing a first degree murder charge related to Winters' death. He stated he was testifying at Patton's trial and had testified before "[i]n hopes to get a deal." On direct examination, he stated he had been promised "[n]othing" in return for his testimony.

On cross-examination, Northrop testified that when he gave his initial statement to police, he wanted to minimize his own involvement and maximize everyone else's to "help [him]self out." He stated that he had told lies under oath and was trying to "save" himself by testifying. He stated he was "hoping" that he would get a benefit from the prosecution, because he had testified against Patton and other persons charged with Winters' murder.

Clearly, Patton was not absolutely prohibited from cross-examining Emily and Northrop with respect to a prototypical form of bias, namely, whether their testimony against Patton was influenced by their desire to receive favorable treatment from prosecutors in their pending murder cases. Thus, the question before us is whether a reasonable jury would have received a significantly different impression of the witnesses' credibility had counsel been permitted to carry the cross-examination one

step further by inquiring as to the specific penalty they faced if convicted of first degree murder.[12]

We applied this test to a limitation on the cross-examination of a prosecution witness who had participated in the crime charged in *State v. Stark*.[13] The witness, Scott McNeill, testified that it was the defendant, Dennis Stark, who struck the fatal blow to the victim's head with a hammer. Stark testified that it was McNeill who struck the blow. Stark was not permitted to cross-examine McNeill regarding his fear of receiving the death penalty and, on appeal, contended that his right to confrontation was thus violated. We found that Stark was permitted to question McNeill about the reduction of charges against him to second degree murder and his concern about getting the death penalty without objection. We determined that this cross-examination "was sufficient to support an argument that McNeill had a motive to confess and testify against Stark"[14] and that thus, it could not be said that the jury would have received a significantly different impression of McNeill's credibility had Stark been permitted to cross-examine him more extensively about his fear of receiving the death penalty.

Stark is somewhat distinguishable from the instant case in that neither Emily nor Northrop mentioned the specific penalty for first degree murder at any point in their testimony. Patton urges that we follow the reasoning of the Arizona Supreme Court in *State v. Morales*.[15] In that first degree murder case, the key prosecution witness was a 15-year-old who had been a principal participant in the crime and was testifying at the trial pursuant to a plea agreement. The jury was told that pursuant to the agreement, if the State found the testimony of "'substantial aid'" in its prosecution, it would withdraw its request to

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[12] See *State v. Privat*, *supra* note 8. See, also, *State v. Banks*, *supra* note 10; *State v. Stark*, *supra* note 6.

[13] *State v. Stark*, *supra* note 6.

[14] *Id.* at 100, 718 N.W.2d at 520.

[15] *State v. Morales*, 120 Ariz. 517, 587 P.2d 236 (1978).

transfer the witness' then pending juvenile case to adult court and the witness would enter an admission to the charge of second degree murder in juvenile court.[16] The jury was further told that if this occurred, the witness would be subject to the jurisdiction of the juvenile court only until he turned 21 years of age. Defense counsel sought to introduce evidence that if the witness' case had been transferred to adult court, he would have faced the possibility of death or life in prison, but the trial court prevented counsel from doing so, reasoning such evidence would alert the jury to the possible penalty faced by the defendant before it. In reversing the conviction, the Arizona Supreme Court held:

> Whatever merit [the trial court's] reason may have, it cannot outweigh the right of the defendant to cross-examine the State's major witness on what he expects in return for his testimony. The fact that the witness faced a possible death penalty if he did not testify for the State surely would be a factor if not the factor in the witness's decision to testify. The trial court's refusal to allow inquiry into the penalty the witness would have faced had he not agreed to testify was reversible error.[17]

There is authority in Nebraska for the general proposition that jurors need not and should not be told of the punishment faced by a defendant if convicted.[18] We agree with the Arizona Supreme Court that this principle should yield to the right of a defendant to cross-examine a prosecution witness regarding the penalty that he or she is avoiding or seeking to avoid by testifying, even if such cross-examination necessarily discloses the penalty faced by the defendant if convicted.

But this case differs from *Morales* in three key respects. First, Emily and Northrop did not face the death penalty. Second, the jury learned of the potential life sentences Emily and Northrop were facing from another witness. Third, both

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[16] *Id.* at 519, 587 P.2d at 238.

[17] *Id.* at 520, 587 P.2d at 239.

[18] See, *State v. Nelson*, 182 Neb. 31, 152 N.W.2d 10 (1967); *State v. McDaniel*, 12 Neb. App. 76, 667 N.W.2d 259 (2003). See, also, NJI2d Crim. 9.5.

Emily and Northrop were extensively cross-examined about the benefit they hoped to obtain by testifying.

After both Emily and Northrop had testified, Omaha Police Det. Dan Martin appeared as a prosecution witness. Martin was cross-examined regarding his initial interview with Emily following her arrest. He stated that Emily originally told him that she had gone to Winters' home to purchase marijuana, heard an altercation, and then left. Martin testified that Emily changed her story and described the robbery attempt after he told her that the others were saying she had planned the robbery. This cross-examination included the following exchange:

> [Defense counsel:] And did you tell [Emily] what the consequences would be if she was — you know, if she was responsible for everything?
>
> [Martin:] Yes.
>
> Q. What did you tell her?
>
> A. So that she could be arrested just like everyone else. Life in prison.
>
> Q. Life in prison. So once you told her that she was facing that penalty, what did she do?
>
> A. She told me another version of her story.

Shortly after this, a sidebar conference was held during which the prosecutor argued that "there should be no more mention" of the penalty, and the court replied, "It came out. Now leave it alone." There was no motion to strike the testimony, and the jury was not instructed to disregard it. However, at the State's request, the court directed defense counsel not to refer to Martin's testimony regarding the penalty in his closing argument. Nevertheless, Martin's testimony informed the jury that the penalty for first degree murder faced by Emily (and by necessary implication, Northrop), was life imprisonment; that Emily was aware of this fact long before she testified at trial; and that she changed her story and incriminated Patton and others after learning of the penalty she faced.

In view of Martin's testimony, and considering the cross-examinations of Emily and Northrop in their entirety, we cannot conclude that a jury would have received a significantly different impression of their credibility if counsel had

been permitted to elicit the fact that they faced life sentences for first degree murder. It was abundantly clear from their testimony that they were cooperating with the prosecution in an attempt to obtain favorable treatment on their pending charges, and for no other reason. Both admitted that they were attempting to "save" themselves. Emily admitted that if she did not have any hope of leniency, she would probably not testify. When Northrop was asked if he found himself in the position of "hav[ing] to testify for the prosecutors" in order to achieve his goal of saving himself, he responded, "Hopefully, yes."

Although Patton was not permitted to cross-examine Emily and Northrop regarding the specific sentences they hoped to avoid by testifying for the State, he was permitted to examine them regarding the specific benefit they hoped to obtain. Emily understood that if her case were transferred to juvenile court, she would not go to prison and would be "free and clear" on her 19th birthday, when the juvenile court would no longer have jurisdiction. She agreed that this would be a "pretty good deal" and was hoping that it would happen. Northrop, who had two prior felony convictions, testified that he understood the difference in penalties for the four classes of Nebraska felonies and was hoping that prosecutors would allow him to plead guilty to an accessory offense, for which he could receive as little as 1 or 2 years in prison. Even without knowing the specific penalty for first degree murder, a reasonable juror would understand from this testimony that Emily and Northrop were hoping to obtain a substantial benefit from their cooperation with the prosecution. And the jury was instructed that it was the sole judge of the credibility of the witnesses and could consider, among other things, "[t]heir interest in the result of the suit, if any," and "[t]heir apparent fairness or bias . . . ."

Because the jury learned of the penalty for first degree murder from another witness and because Emily and Northrop were cross-examined extensively on their motivation to obtain leniency from the prosecution by testifying, a reasonable jury would not have received a significantly different impression of

the witnesses' credibility had defense counsel been permitted to ask what specific penalty Emily and Northrop faced. There was no violation of Patton's confrontation right.

(b) Cross-Examination of Moyers

Moyers was Winters' former girlfriend. She testified on direct examination that 2 days before the robbery, Patton asked her for information about where Winters kept his drugs because Patton wanted to rob Winters. She also testified that after her relationship with Winters ended in December 2010, she remained friendly with his mother, explaining they were together frequently and were "[a]lmost best friends." Moyers testified that she went to Winters' home after she learned of the shooting "[b]ecause I was really close to the family."

On cross-examination, Moyers was asked about her relationship with Winters' family while she was dating him and the frequency of her visits to the Winters' home. When asked about her relationship with Winters' mother, she said it was "good at the time." Patton's counsel then asked, "How is it now?" The court sustained the State's relevancy objection to this question.

At that point, there was a sidebar conference at which Patton's counsel argued he should be able to pursue his inquiry because according to the deposition testimony of an unidentified witness, the Winters' family blamed Moyers for Winters' death, and this gave Moyers a motive to falsify or exaggerate her testimony against Patton. The prosecutor argued that Moyers' current relationship with Winters' family was irrelevant. The court again sustained the objection. There was no offer of proof.

Because Patton was not completely prevented from cross-examining Moyers regarding a possible bias stemming from her relationship with Winters' family, the restriction on cross-examination must be assessed under the second prong of the test in *State v. Privat*.[19] Patton argues that Moyers believed

[19] See *State v. Privat*, *supra* note 8.

that Winters' family blamed her for his death and that "this belief, whether accurate or not, is a motive for the witness to exaggerate her knowledge of the situation in an effort to assuage the feelings of the Winters family."[20] This inference is somewhat tenuous, and the record does not include any evidentiary showing that Moyers held this belief. A stronger inference of Moyers' potential bias against Patton can be drawn from her testimony that she had a close relationship with Winters' family both during the time that she dated Winters and after they broke up. This evidence gave Patton a basis for arguing that Moyers had a personal bias in favor of Winters' family and thus a motive to assist the prosecution. We cannot conclude that a reasonable jury would have had a significantly different impression of her credibility had it known that Moyers believed that Winters' family blamed her for his death, and thus, there was no violation of Patton's confrontation rights.

2. Tacit Plea Agreements

Patton contends that the State made tacit plea agreements with Emily and Northrop whereby they would receive a reduction in charges and, in Emily's case, a transfer to juvenile court in exchange for their testimony. He contends that his due process rights were violated by the trial court's ruling that he could not present evidence from the attorneys for Emily and Northrop with respect to such agreements or an understanding not to reach plea agreements prior to trial. And he contends that the State's failure to disclose the purported agreements violated his due process rights as articulated in *Brady v. Maryland*[21] and *United States v. Bagley*.[22]

[11,12] The existence of an agreement to testify by a witness under threats or promises of leniency made by the prosecutor is relevant to the credibility of such witness, and failure to bring that to the attention of the jury denies the defendant

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[20] Brief for appellant at 48.

[21] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

[22] *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).

due process of law.[23] An expectation of leniency on the part of a witness, absent evidence of any expressed or implied agreement, need not be revealed to the jury.[24]

(a) Attorney Testimony

As noted, both Emily and Northrop testified that they hoped for favorable consideration from the State in exchange for their testimony. Both also testified they had not been promised or assured that they would receive it. In other words, both denied that they had entered into any plea agreement with the State. Patton contends that the State entered into tacit plea agreements with both witnesses, which his counsel characterized as a "wink and [a] nod at each other and say, we'll take care of you; we just don't want to promise you anything."

To prove this claim, Patton sought to offer testimony from the attorneys who were representing Emily and Northrop in their pending first degree murder cases. In an offer of proof, Emily's attorney acknowledged that he had made repeated efforts to persuade prosecutors to transfer Emily's case to juvenile court and had filed a motion requesting the transfer, which was pending. But he stated: "There's never been an express agreement that — or anything in writing or any deal that would lead to [Emily's] going to juvenile court." He acknowledged that "everything she does towards cooperation, at this point, can only help her" and that it was his "expectation that she will end up in juvenile court based on conversations I've had." He acknowledged that in some cases, he has reached a "tacit agreement" with prosecutors with respect to a cooperating codefendant. But when asked if he had a tacit agreement with respect to Emily, he replied:

> Well, this is a little different because, again, usually I would know — I would be able to tell exactly what — when I take something to my client, I can tell them, this is how this is going to happen, this is when it's going to happen. Again, there have been no promises or actual

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[23] *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006); *State v. Rice*, 214 Neb. 518, 335 N.W.2d 269 (1983).

[24] *Id.*

> agreements made in this case for how that's going to be done.

Emily's attorney testified that he was confident that her case would be moved to juvenile court because of her cooperation, age, and lack of a prior record, but stated, "I have not been told by the prosecutor's office she will be moved up to juvenile court."

In a narrative offer of proof, Patton's counsel stated that if called as a witness, Northrop's counsel would testify that he had conversations with a prosecutor but had received "no specific agreement in writing or one that would be put on the record, only that it would be considered . . . they would consider lesser offenses, depending on how things came out."

The district court sustained relevancy objections to both offers of proof. We find no error in this ruling. The attorneys' testimony would not have impeached the testimony of Emily and Northrop, because it was consistent with both witnesses' testimony that they hoped for leniency in exchange for their testimony, but had received no promises or assurances from the State. Because the attorneys' testimony fell short of establishing implied or "tacit" plea agreements benefiting Emily and Northrop, it was irrelevant.

Nor are we persuaded by Patton's argument that the State "opened the door" to the admissibility of the attorneys' testimony by eliciting from Emily and Northrop on direct examination that they had received no promises of leniency in exchange for their testimony.[25] The manner in which this issue was initially raised at trial does not change the fact that the proffered testimony of the attorneys does not contradict or impeach the testimony of their clients that they had not received any promise of leniency from the State in exchange for their testimony.

(b) *Brady*/*Bagley* Failure to Disclose

In *Brady v. Maryland*, the U.S. Supreme Court held that the prosecution has a duty to disclose all favorable evidence

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[25] See brief for appellant at 44.

to a criminal defendant prior to trial.[26] The Court clarified in *United States v. Bagley* that impeachment evidence, as well as exculpatory evidence, falls within the *Brady* rule.[27] Patton contends that the State failed to disclose tacit agreements with Emily and Northrop which he could have utilized to impeach their credibility.

But as we have noted, the evidence in this record does not establish the existence of tacit plea agreements between the State and the two witnesses for the prosecution. Both testified that they hoped to obtain leniency in exchange for their testimony but had not received any assurances or promises from the State. In *State v. Rice*,[28] a prosecution witness charged with the same murder as the defendant testified that he chose to testify because he felt things would go easier for him if he did, but repeatedly denied that any deal had been struck with the prosecution. We held that while this testimony established that the witness had an expectation of leniency in exchange for his testimony, it fell short of establishing an express or implied promise by the State. We reach the same conclusion here.

[13,14] For completeness, we note that Patton relies in part on documents attached as an "Appendix" to his brief in support of his argument that tacit plea agreements existed. These documents are not included in the bill of exceptions. A party's brief may not expand the evidentiary record.[29] A bill of exceptions is the only vehicle for bringing evidence before an appellate court; evidence which is not made a part of the bill of exceptions may not be considered.[30] Accordingly, we do not consider these documents in our disposition of this issue.

3. Emily's Involvement in Prior Robberies

Patton argues that the district court erred in sustaining the State's objection to the admission of evidence that Emily and

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[26] *Brady v. Maryland*, *supra* note 21.

[27] *United States v. Bagley*, *supra* note 22.

[28] *State v. Rice*, *supra* note 23.

[29] *State v. Rust*, 247 Neb. 503, 528 N.W.2d 320 (1995).

[30] *State v. Williams*, 253 Neb. 111, 568 N.W.2d 246 (1997).

Elseman had committed other home invasion robberies of drug dealers in the months prior to the robbery and shooting of Winters and that Patton was not involved in those robberies. Prior to trial, the court sustained the State's motion in limine with respect to this evidence. In support of an offer of proof at trial, Patton offered sworn testimony of Emily admitting that she had participated in prior robberies with Elseman in which Patton was not involved. Patton's counsel stated that the evidence was not offered to show propensity, but, rather, to show that Emily and Elseman had been involved in prior similar crimes in which Patton was not a participant, which was consistent with Patton's defense that he was not a participant in the Winters robbery attempt.

We agree with the district court's determination, implicit in sustaining the State's objection, that the evidence was not relevant for any legitimate purpose, including impeachment. In addressing this identical issue in *State v. Ely*,[31] which involved another defendant convicted of Winters' murder, we stated:

> [T]he fact that Emily and Elseman may have committed prior robberies without the knowledge or participation of Ely is irrelevant to any issue in this case. . . . The fact that Ely was not involved in prior unlawful conduct has no bearing, one way or another, on the issue of whether he committed the crimes he was charged with in this case.

For the same reason, the evidence of prior home invasion robberies committed by Emily and Elseman without the participation of Patton was inadmissible in this case.

V. CONCLUSION

For the reasons discussed, we find no reversible error and therefore affirm.

AFFIRMED.

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[31] *State v. Ely, ante* p. 147, 155, 841 N.W.2d 216, 223-24 (2014).

Brad Woodle and Chase Woodle, appellants, v. Commonwealth Land Title Insurance Company, a Nebraska corporation, and Omaha Title & Escrow, Inc., a Nebraska corporation, appellees.

844 N.W.2d 806

Filed April 11, 2014. No. S-13-111.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
2. **Insurance: Contracts.** An insurance policy is a contract, and when the facts are undisputed, whether or not a claimed coverage exclusion applies is a matter of law.
3. **Contracts: Appeal and Error.** The interpretation of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below.
4. **Pleadings: Words and Phrases.** The use of specific language asserting defenses is not required, nor is it necessary to state a defense in any particular form, as long as the facts supporting the assertion are stated and sufficient facts are pled to constitute the raising of the alleged defense.
5. **Appeal and Error.** In the absence of plain error, when an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.
6. **Easements: Words and Phrases.** An easement is an interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose.
7. **Easements: Real Estate: Conveyances.** An easement by implication from former use arises only where (1) the use giving rise to the easement was in existence at the time of the conveyance subdividing the property, (2) the use has been so long continued and so obvious as to show that it was meant to be permanent, and (3) the easement is necessary for the proper and reasonable enjoyment of the dominant tract.

Appeal from the District Court for Sarpy County: Max Kelch, Judge. Affirmed.

Ronald E. Reagan, Richard W. Whitworth, and A. Bree Swoboda, Senior Certified Law Student, of Reagan, Melton & Delaney, L.L.P., for appellants.

John D. Stalnaker and Robert J. Becker, of Stalnaker, Becker & Buresh, P.C., for appellees.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

WRIGHT, J.

NATURE OF CASE

Brad Woodle and Chase Woodle commenced this action against Commonwealth Land Title Insurance Company (Commonwealth) and Omaha Title & Escrow, Inc., to recover fees, costs, and indemnification pursuant to a policy of title insurance issued by Commonwealth insuring property owned by the Woodles. The district court concluded as a matter of law that Commonwealth had no duty to indemnify or defend the Woodles concerning implied easements on the property. It sustained Commonwealth's motion for summary judgment and dismissed the action with prejudice. The Woodles now appeal the court's dismissal concerning Commonwealth, and Omaha Title & Escrow is not at issue in this appeal. We affirm.

SCOPE OF REVIEW

[1] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence. *Cartwright v. State*, 286 Neb. 431, 837 N.W.2d 521 (2013).

[2] An insurance policy is a contract, and when the facts are undisputed, whether or not a claimed coverage exclusion applies is a matter of law. *Miller v. Steichen*, 268 Neb. 328, 682 N.W.2d 702 (2004), *appeal after remand sub nom. Fokken v. Steichen*, 274 Neb. 743, 744 N.W.2d 34 (2008).

[3] The interpretation of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below. *Fitzgerald v. Community Redevelopment Corp.*, 283 Neb. 428, 811 N.W.2d 178 (2012).

FACTS

On November 28, 2008, the Woodles entered into a contract to purchase real property described as "Lot 2, Sun Country Addition, an addition in Sarpy County, Nebraska" (Lot 2). At the time of purchase, Commonwealth issued its policy of insurance. Lot 2 was subject to two express easements that were executed in favor of the owners of the adjacent lots in Sun Country Addition (collectively Lots 1 and 3).

After purchasing Lot 2, the Woodles filed a quiet title action against the owners of Lots 1 and 3, seeking a declaration that the express easements granted in favor of Lots 1 and 3 (which were specifically excepted from coverage under the policy issued by Commonwealth) were invalid. The owners of Lot 1 (William and Sandy Curlis) and Lot 3 (David and Susan Zajac) filed counterclaims asserting that the express easements were valid or, in the alternative, they were entitled to easements or ownership of the disputed property under an implied easement, adverse possession, or easement by proscription. The Curlises used the west part of the driveway located on Lot 2 to access their garage, shed, septic tank, and propane tank. Their use of the western portion of the driveway loop for ingress and egress has been continuous. The Zajacs have exercised continuous use of a portion of the driveway on Lot 2 to access the south and west sides of their cabinet shop located on Lot 3. (These easements would allow ingress and egress for Lots 1 and 3 in the same manner whether the easements were express or implied.) When the counterclaims were filed, the Woodles submitted to Commonwealth a claim for defense. Commonwealth denied the claim, asserting there was no coverage under the policy for indemnification or defense of any of the counterclaims.

In the quiet title action, the court found that Lot 2 was advertised for sale at auction to be held on November 25, 2008. Sandy Curlis and the Woodles attended an open house on the property 2 days before the auction was to be held. The next day, Sandy Curlis requested a preliminary title search and was advised that there was a 1992 easement on the west side which was of questionable validity because of a later quitclaim deed and another easement document on file

pertaining to the east side, which easement was also of questionable validity.

According to Sandy Curlis, on the evening of November 24, 2008, she and the Woodles went to the property and met with David Zajac, who informed them that both of the adjoining lot owners had easements to use portions of the driveway on Lot 2. Sandy Curlis and the Woodles saw the existing drives on both the east and west sides of the lot prior to the auction and knew they were used by someone. In the quiet title action, the Woodles alleged that previous written easements on Lot 2 had been extinguished, but the owners of Lots 1 and 3 asserted that they had continuing rights to use and travel upon Lot 2, which cast a cloud upon the title of Lot 2.

The district court extinguished the express easements and denied the counterclaims of the owners of Lots 1 and 3 regarding express easement, public easement, and adverse possession. However, the court concluded that the owners of Lots 1 and 3 possessed implied easements for ingress and egress arising from prior use.

While the quiet title action was pending, the Woodles filed the present action against Commonwealth, seeking a determination that Commonwealth had breached its duty under the title insurance policy by refusing to provide a defense to the counterclaims and seeking damages for any diminution in value of Lot 2 as a result of the counterclaims filed in the underlying action. Commonwealth answered, asserting that the policy, by its terms, did not provide coverage for the counterclaims in the quiet title action. The relevant portions of the policy provide as follows:

> COVERED RISKS
>
> SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, COMMONWEALTH LAND TITLE INSURANCE COMPANY, a Nebraska corporation . . . insures, as of Date of Policy . . . against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:
>
> 1. Title being vested other than as stated in Schedule A.

. . . .

The following matters are expressly excluded from the coverage of this policy, and [Commonwealth] will not pay loss or damage, costs, attorneys' fees, or expenses that arise by reason of:

. . . .

3. Defects, liens, encumbrances, adverse claims, or other matters

(a) created, suffered, assumed, or agreed to by the Insured Claimant;

. . . .

(d) attaching or created subsequent to Date of Policy

. . . .

. . . .

OWNER'S POLICY
SCHEDULE B
EXCEPTIONS FROM COVERAGE

. . . .

This policy does not insure against loss or damage (and [Commonwealth] will not pay costs, attorneys' fees or expenses) which arise by reason of:

1. Rights or claims of parties in possession not shown by the public records.

2. Unrecorded easements, discrepancies or conflicts in boundary lines, shortage in area and encroachments which an accurate and complete survey would disclose.

. . . .

7. Easement recorded March 17 1993 . . . granted to Owners of Lots 2 and 3 Sun Country over a portion of property described therein for Ingress and Egress.

8. Lot Line Adjustment recorded June 17 2003 . . . granted to Owners of Lots 2 and 3 Sun Country over a portion of property described therein for Lot line adjustment to Plat.

9. Right of Way Easement dated July 18, 2002, recorded April 30, 2008 . . . .

Commonwealth moved for summary judgment, asserting that under "Exclusion 3(d)," the policy did not provide coverage for "defects, liens, encumbrances, adverse claims or

other matters . . . created subsequent to the date of policy." The district court found that although the implied easements may have existed prior to judgment, neither easement had significance, such as enforceability, until the easement was judicially recognized by a court judgment. It concluded that the easements attached when the judgment was entered in the quiet title action, which judgment held that implied easements existed over Lot 2 in favor of Lots 1 and 3. Because there was no court order or judgment in place establishing either easement by implication as of the date of the title insurance policy, Exclusion 3(d) applied, and as a result, Commonwealth was not required to provide a legal defense to the Woodles in regard to the counterclaim filed by the owners of Lots 1 and 3. The court concluded that there was no genuine issue as to any material fact and that therefore, Commonwealth was entitled to judgment as a matter of law. It sustained the motion for summary judgment filed by Commonwealth and dismissed the cause of action against Commonwealth with prejudice.

The Woodles timely appealed. We moved the case to our docket pursuant to our authority to regulate the dockets of this court and the Nebraska Court of Appeals. See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

ASSIGNMENTS OF ERROR

The Woodles allege, restated, that the district court erred in relying on Exclusion 3(d), which was not raised as an affirmative defense by Commonwealth; concluding that the implied easements did not attach until they were judicially recognized; finding no coverage under the policy; sustaining summary judgment in favor of Commonwealth; and overruling summary judgment in their favor.

ANALYSIS

The Woodles' claims against Commonwealth were based upon their expenses incurred in the quiet title action described above. They argue that because the title insurance policy did not expressly exclude the implied easements, Commonwealth breached its contract by not defending and indemnifying the

Woodles regarding the counterclaims established by the owners of Lots 1 and 3 concerning the implied easements over Lot 2.

Exclusion 3(d) of Title Insurance Policy

The Woodles claim the district court erred in relying upon Exclusion 3(d) of the title insurance policy, because Commonwealth had not raised Exclusion 3(d) in its denial of coverage or as an affirmative defense. The Woodles contend they were not put on notice that Commonwealth intended to argue Exclusion 3(d) until argument was presented before the district court.

Commonwealth asserts that the Woodles failed to raise this issue in the district court, despite Commonwealth's reliance on Exclusion 3(d) at three prior hearings on motions for summary judgment. Commonwealth raised Exclusion 3(d) at these hearings, and the Woodles did not object to Commonwealth's reliance on Exclusion 3(d) or assert that Commonwealth should be barred from raising it as a defense. Commonwealth points out that even if it should have pled Exclusion 3(d) as an affirmative defense, had the Woodles objected during the proceedings below, Commonwealth would have moved to amend its answer and likely would have been granted leave to do so. We agree.

[4] The use of specific language asserting defenses is not required, nor is it necessary to state a defense in any particular form, as long as the facts supporting the assertion are stated and sufficient facts are pled to constitute the raising of the alleged defense. *Gies v. City of Gering*, 13 Neb. App. 424, 695 N.W.2d 180 (2005). See, also, *Diefenbaugh v. Rachow*, 244 Neb. 631, 508 N.W.2d 575 (1993). Commonwealth claimed the title insurance policy did not provide coverage for the Woodles' claim. In its answer, Commonwealth asserted that the Woodles failed to state a cause of action because "any and all claims which are the subject of this litigation and were submitted to Commonwealth for coverage were considered and properly denied by Commonwealth under the title insurance policy, [attached as] Exhibit C." Commonwealth raised

this defense in three summary judgment motion hearings argued in the district court. The Woodles made no objection to Commonwealth's reliance on the provisions of the policy as a defense.

[5] In the district court, the Woodles had numerous opportunities to object to Commonwealth's reliance on Exclusion 3(d) and did not do so. Because this objection was not presented to the lower court, we will not address it on appeal. In the absence of plain error, when an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition. *In re Estate of Rosso*, 270 Neb. 323, 701 N.W.2d 355 (2005). We find no plain error in the court's consideration of Exclusion 3(d).

Implied Easements Attach When Judicially Recognized by Court Judgment

In the appeal from the quiet title action, the Woodles claimed that the district court erred in finding that easements by implication from former use existed over Lot 2 in favor of Lots 1 and 3. That issue was decided adversely to the Woodles' claim of error. See *Woodle v. Curlis*, No. A-10-954, 2012 WL 399854 (Neb. App. Feb. 7, 2012) (selected for posting to court Web site).

Here, the Woodles argue that the district court erred in concluding that the implied easements did not attach to the property until they were judicially recognized. The Woodles claim the easements were created in 1992 and became appurtenant to the land at that time. They assert that because the easements were appurtenant, they attached to the land at that time and would pass with the land on subsequent conveyances, and that because the policy was issued subsequent to the easements, the easements were not excluded under Exclusion 3(d).

Commonwealth argues that the implied easements are interests that do not exist as a result of a grant or conveyance. Instead, it is a court's decree that usually establishes the right. Because it requires a court's decree, an implied easement does not "attach" to the land until it is judicially decreed.

[6,7] An easement is an interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose. *Feloney v. Baye*, 283 Neb. 972, 815 N.W.2d 160 (2012). An easement by implication from former use arises only where (1) the use giving rise to the easement was in existence at the time of the conveyance subdividing the property, (2) the use has been so long continued and so obvious as to show that it was meant to be permanent, and (3) the easement is necessary for the proper and reasonable enjoyment of the dominant tract. *O'Connor v. Kaufman*, 260 Neb. 219, 616 N.W.2d 301 (2000).

In *Woodle v. Curlis, supra*, the Court of Appeals found that Lots 1, 2, and 3 were commonly owned by William Thomas Custom Cabinets, Inc., from 1986 until 1992, when Lot 2 was conveyed to Tommy and Phyllis Ogg. This marked the first time that Lots 1, 2, and 3 were not under common ownership. At the time Lot 2 was conveyed, the driveway on Lot 2 was subject to the implied easements and was being used by the Curlises, who had a residence on Lot 1, for the purpose of ingress and egress to Lot 1. The Zajacs' cabinet shop was built in 1984, and the cabinet company used the driveway on Lot 2 to access the cabinet shop on Lot 3 with a truck and trailers. The uses of the easements were in existence at the time of the conveyance subdividing Lots 1, 2, and 3. The use of the driveway on Lot 2 had been so continuous and obvious as to show that it was meant to be permanent. The Court of Appeals concluded the implied easements were created in 1992 when the lots were subdivided, but it did not specifically address the question when the implied easements attached to the land.

In Nebraska, we have not addressed the question when an implied easement attaches to land. The Virginia Supreme Court has addressed a similar issue in *Carstensen v. Chrisland Corp.*, 247 Va. 433, 442 S.E.2d 660 (1994). The issue was when an easement by necessity attached to the land. The title insurance policy was similar to the one in the present case and excluded encumbrances "'attaching or created subsequent'" to the date of the policy. *Id.* at 441, 442 S.E.2d at 665. The insured argued that an easement by necessity arose at the time

the dominant tract was severed from the subservient tract and that because the easement had attached before the policy was issued, the exclusion did not apply.

The Virginia Supreme Court disagreed. It concluded that although "an easement by necessity legally arises at the time the servient estate is severed from the dominant estate, the easement may remain inchoate until established through judicial order or otherwise. An easement often is not judicially established or sought to be established for many years following the initial severance." *Id.* at 442, 442 S.E.2d at 665. The court reasoned that requiring title insurance companies to research title records for all contiguous properties to determine if a latent easement existed would be an unreasonable burden to place on the title insurance company. *Id*. It concluded that the exclusions of the title insurance policy applied and did not cover any losses sustained as a result of the easements by necessity which were established through judicial order entered after the policy date.

Although *Carstensen v. Chrisland Corp.*, *supra*, addressed an easement by necessity, an easement by implication can be analyzed in the same manner. Both easements are interests that come into existence by a court order recognizing their existence rather than by an express grant or easement. We follow the same analysis. In the case at bar, the easements were implied from prior and continuous use but were not of record until a court order legally recognized their existence.

The implied easements were not legally recognized until the court order was entered in the quiet title action. The implied easements over Lot 2 arose from prior use before the policy of insurance was issued, but they remained inchoate until the court order judicially recognized their existence. They were of no force or effect until the court determined that they existed. It was at the time of judicial recognition that the implied easements attached to Lot 2 and became of public record.

We therefore conclude that for purposes of the policy of title insurance in question, the implied easements "attached" to Lot 2 at the time of the district court's decree which recognized their existence. Easements that are created or attach

subsequent to the date of the policy are excluded. Because the implied easements remained inchoate, they did not attach to Lot 2 until they were legally recognized by the decree of the district court which was entered September 7, 2010. The date of the title insurance policy was December 31, 2008. Because the implied easements attached subsequent to issuance of the policy, the easements were excluded by the terms of the policy. As a matter of law, Commonwealth did not have a duty to defend or indemnify the Woodles.

CONCLUSION

The provisions of the title insurance policy on Lot 2 did not provide coverage for the easements of ingress and egress for the benefit of Lots 1 and 3. Commonwealth did not violate its contract with the Woodles by denying coverage or indemnification. The district court did not err in sustaining Commonwealth's motion for summary judgment. Finding no merit in the Woodles' assignments of error, we affirm the judgment of the district court.

AFFIRMED.

MATTHEW KIM, APPELLEE, V. GEN-X CLOTHING, INC., AND FARMER'S TRUCK INSURANCE EXCHANGE (FARMERS), APPELLANTS.

845 N.W.2d 265

Filed April 11, 2014. No. S-13-802.

1. **Workers' Compensation: Appeal and Error.** A judgment, order, or award of the Workers' Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court, the findings of fact of the trial judge will not be disturbed on appeal unless clearly wrong.
3. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact in a workers' compensation

case, every controverted fact must be resolved in favor of the successful party and the successful party will have the benefit of every inference that is reasonably deducible from the evidence.

4. **Workers' Compensation: Words and Phrases.** Temporary disability is the period during which the employee is submitting to treatment, is convalescing, is suffering from the injury, and is unable to work because of the accident.
5. **Workers' Compensation.** Total disability exists when an injured employee is unable to earn wages in either the same or a similar kind of work he or she was trained or accustomed to perform or in any other kind of work which a person of the employee's mentality and attainments could perform.
6. ____. Whether a plaintiff in a Nebraska workers' compensation case is totally disabled is a question of fact.
7. **Workers' Compensation: Appeal and Error.** Where the record presents nothing more than conflicting medical testimony, an appellate court will not substitute its judgment for that of the Workers' Compensation Court.
8. **Workers' Compensation.** As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given their testimony.

Appeal from the Workers' Compensation Court: JAMES R. COE, Judge. Affirmed.

Stacy L. Morris, of Lamson, Dugan & Murray, L.L.P., for appellants.

Dirk V. Block and Steven J. Riekes, of Marks, Clare & Richards, L.L.C., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

HEAVICAN, C.J.

INTRODUCTION

Matthew Kim was employed by Gen-X Clothing, Inc., a retail clothing store. While he was working, the store was robbed. The perpetrators later returned and shot Kim multiple times. Kim was thereafter diagnosed with both posttraumatic stress disorder (PTSD) and chemical dependency. Kim filed for workers' compensation benefits.

Following a hearing, the Workers' Compensation Court found that Kim had not yet reached maximum medical improvement (MMI) and was entitled to temporary total disability (TTD) benefits. In addition, the compensation court found Kim's inpatient treatment for chemical dependency, as well as an

October 2, 2011, emergency room visit, compensable. Finally, the compensation court credited Gen-X Clothing and its insurance carrier, Farmer's Truck Insurance Exchange (Farmers) (hereinafter collectively Gen-X), for prior medical expenses paid and found that Kim was entitled to payment of future medical expenses. Gen-X appeals. We affirm.

FACTUAL BACKGROUND

Kim was employed as a manager by Gen-X Clothing, a retail clothing store located in Omaha, Nebraska. He was working on June 28, 2011, when he suffered multiple gunshot wounds. The shooting was revenge for the reporting of an earlier robbery at the store. After the shooting, the perpetrators made telephone calls to Kim, further threatening him, his mother, and his son.

In September 2011, Kim began seeing Peter Cusumano, a licensed mental health practitioner and a licensed alcohol and drug counselor. Cusumano evaluated Kim, diagnosed him with PTSD and chemical dependency, and determined that he would benefit from outpatient treatment. Prior to the shooting, Kim drank alcohol and was a recreational drug user. But Kim testified that around the time he began treatment with Cusumano, his use of alcohol and drugs began to increase. Kim testified that he used the alcohol and drugs to help him sleep and to cope with the shooting.

On October 2, 2011, Kim visited the emergency room after waking from a nightmare and suffering a panic attack. Right around the time of this visit, the record shows that Kim's medical providers began recommending inpatient treatment for Kim, because they did not believe he could safely detoxify without experiencing significant, possibly fatal, withdrawal. Kim was eventually admitted to inpatient drug and alcohol treatment on February 13, 2012.

At trial, Kim testified to his life since the shooting. He indicated that he suffered from anxiety and mostly stayed at home, especially at night. Kim testified that he attended church and his son's school functions. When he did go out, he would do so "way out in West Omaha," because he was afraid to be in his own neighborhood. Kim testified that about two

to three times per week, he has nightmares about his family's being harmed. Kim testified that he bought a gun and carries a pocketknife with him. Kim also testified that the threatening telephone calls led the family to move out of his mother's home for a period of time.

Cusumano testified at trial. He was cross-examined about Kim's prior drug use and indicated that such use would not have required inpatient rehabilitation if Kim had not been shot. Cusumano agreed that he had opined Kim needed "rehab," regardless of the shooting, but denied that he meant inpatient treatment when he used that term.

Dr. Brian Lubberstedt was Kim's treating psychiatrist. Lubberstedt was also extensively questioned about Kim's prior drug use. Lubberstedt testified by deposition that Kim's prior use was recreational and that the prior use did not meet any of the criteria for alcohol or chemical dependency. Lubberstedt and counsel for Gen-X had the following exchange:

> [Gen-X counsel:] And you indicated also that you couldn't tell for sure whether . . . Kim had alcohol and drug dependency prior to the shooting because you hadn't seen him prior to the shooting?
>
> [Lubberstedt:] Correct.
>
> Q. Isn't it also true that you can't say for sure whether the rehab, inpatient rehab that he went through was a result of solely the shooting or whether it was something that he would have needed to go to regardless of the shooting?
>
> A. [I] believe with the inpatient rehab that he did. I can say with a little bit more certainty that that one was a result.
>
> He was using regularly upon his first evaluation here but not to the level where it required inpatient . . . chemical dependency treatment, so as far as our clinic goes, we were able to witness that part of the progression of his symptoms from regular problematic use to regular what I would consider to be life-threatening use that then required inpatient treatment.
>
> Q. Inpatient treatment is something that would be called for for sporadic — or just regular use, drug use

> also, right? As opposed to, I guess, an every-day type of thing?
>
> A. Well, somebody with PTSD doesn't always get chemical dependency treatment, and so, I mean, the two — you know, again, the way that he has progressed within our clinic was that when we — when [Cusumano] first saw him, he felt like the use was at a stable level and at the level where he could be successful with outpatient treatment, and so that was what was initially recommended was actually outpatient treatment, and that was not successful due to the escalation that occurred.
>
> Q. But you don't know whether if the shooting hadn't happened he would have needed rehab regardless?
>
> A. No, I don't know if he would have required rehab.

In addition, Kim's prior mental health history was at issue. According to the record, Kim had suffered from bouts of depression beginning in 2003 and occasionally took medication to treat it. Lubberstedt was asked about this history, but indicated that it did not affect the PTSD or chemical dependency diagnosis, because depression and PTSD were "fairly distinct entities."

Finally, Lubberstedt testified that Kim's past psychiatric care, including inpatient treatment, was reasonable and medically necessary as a result of Kim's shooting. He further testified that he did not believe Kim had reached MMI; however, he allowed that because Kim's primary issue was anxiety about leaving his home, Kim might be able to work from home. In his testimony, Cusumano stated that he did not believe Kim was ready to return to work or that Kim had reached MMI.

As of the time of trial, Kim continued to be treated by Lubberstedt and his staff for PTSD and chemical dependency.

Gen-X offered the report of Dr. Eli Chesen. Chesen agreed with Kim's diagnoses of PTSD and chemical dependency, and he further found that Kim's panic, insomnia, and drinking were related to his PTSD. Chesen indicated that the insomnia and drug abuse were caused by the June 28, 2011, shooting and that inpatient treatment, including participation in a 12-step program, would be appropriate.

But Chesen found that Kim had reached MMI on February 22, 2012. Chesen also concluded there was no objective medical evidence to indicate that Kim's ongoing drug use was a consequence of the shooting or that Kim currently required treatment for PTSD.

In a report dated November 4, 2012, Chesen opined that Kim was a lifelong abuser of recreational drugs, that Kim was well past MMI, and that Kim was falsely exaggerating or imputing his PTSD symptoms for secondary gain.

The Workers' Compensation Court awarded Kim TTD benefits of $400 a week and ordered Gen-X to pay certain outstanding medical expenses, including $5,209 for the October 2, 2011, emergency room visit and $13,236.53 for the inpatient chemical dependency treatment, subject to certain credits for prior payment. The compensation court also ordered Gen-X to pay for reasonably necessary further medical and hospital services.

Gen-X appeals.

ASSIGNMENTS OF ERROR

Gen-X assigns that the compensation court erred in (1) finding that Kim was temporarily and totally disabled and in awarding past and future TTD benefits; (2) finding the October 2, 2011, emergency room visit compensable; (3) finding the inpatient substance abuse treatment compensable; and (4) ordering Gen-X to pay for future medical treatment.

STANDARD OF REVIEW

[1,2] A judgment, order, or award of the Workers' Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.[1] In determining whether to affirm, modify, reverse, or set aside a

[1] *Hynes v. Good Samaritan Hosp.*, 285 Neb. 985, 830 N.W.2d 499 (2013).

judgment of the Workers' Compensation Court, the findings of fact of the trial judge will not be disturbed on appeal unless clearly wrong.[2]

[3] In testing the sufficiency of the evidence to support the findings of fact in a workers' compensation case, every controverted fact must be resolved in favor of the successful party and the successful party will have the benefit of every inference that is reasonably deducible from the evidence.[3]

ANALYSIS

Award of TTD Benefits.

[4-6] In its first assignment of error, Gen-X assigns that the compensation court erred in awarding Kim TTD benefits. Temporary disability is the period during which the employee is submitting to treatment, is convalescing, is suffering from the injury, and is unable to work because of the accident.[4] Total disability exists when an injured employee is unable to earn wages in either the same or a similar kind of work he or she was trained or accustomed to perform or in any other kind of work which a person of the employee's mentality and attainments could perform.[5] Whether a plaintiff in a Nebraska workers' compensation case is totally disabled is a question of fact.[6]

Gen-X argues that the trial court's finding that Kim was entitled to TTD benefits was contrary to the evidence presented at trial and was clearly wrong. Gen-X suggests that both Lubberstedt and Chesen testified that Kim was ready to return to work.

We disagree with Gen-X's characterization of the record. Lubberstedt's testimony was that Kim was not ready to return to work, though he allowed that Kim might be able to work from home. In addition, Cusumano testified that he did not believe Kim was ready to return to work. Only Chesen testified

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[2] See *id.*

[3] *Zwiener v. Becton Dickinson-East*, 285 Neb. 735, 829 N.W.2d 113 (2013).

[4] *Id.*

[5] *Id.*

[6] *Id.*

that Kim was ready to return to work. These opinions were all considered by the trial court, which found Lubberstedt's and Cusumano's testimonies more persuasive than Chesen's. This it was allowed to do.[7]

Nor do we find merit to Gen-X's contention on appeal that Kim could work from home. We agree that in response to a question on cross-examination, Lubberstedt did testify to as much. But this statement was contradictory to Lubberstedt's other testimony, as well as to Cusumano's testimony. Where the testimony of the same expert is conflicting, resolution of the conflict rests with the trier of fact.[8] We find no error in the compensation court's resolution of this conflict.

We conclude that the compensation court was not clearly wrong in finding Kim temporarily totally disabled and awarding him TTD benefits. Gen-X's first assignment of error is without merit.

October 2, 2011, Emergency Room Visit.

Gen-X next assigns that the compensation court erred in finding Kim's October 2, 2011, emergency room visit was caused by the shooting. Gen-X argues that there was no medical evidence causally linking the visit to the shooting and that the trial court erred when it found such a link in Lubberstedt's testimony.

The trial court found that the emergency room visit was related to the shooting, because the notes from the visit indicated that Kim reported he had previously been shot and felt unsafe at home. The trial court then discussed the opinions of Lubberstedt and Chesen before concluding that the emergency room visit, as well as the inpatient treatment, was compensable based upon Lubberstedt's testimony that Kim's PTSD and chemical dependency were a result of the shooting.

We agree that Lubberstedt did not testify about the causal link between the emergency room visit and the shooting. But

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[7] See *Swanson v. Park Place Automotive*, 267 Neb. 133, 672 N.W.2d 405 (2003).

[8] *Id.*

we disagree with Gen-X that the trial court found Lubberstedt testified to such a link. Nor do we think expert testimony was necessary to support a causal link between the visit and the shooting.

Instead, we conclude that the trial court was simply noting its reasoning that things relating to the shooting, notably Kim's PTSD and subsequent chemical dependency, were caused by the shooting and were compensable as supported by Lubberstedt's testimony.

And the trial court could reach this decision without Lubberstedt's testifying to a causal link, because such a link was established from the medical record itself. As the trial court found, the notes from the visit indicate that the reason for Kim's visit was the result of his feeling of being unsafe and that he felt unsafe because of the shooting.

Kim's own testimony lends further support to the causal link. Kim testified that right around this time, his alcohol and drug use began to increase and he became afraid to sleep or leave the house. Eventually, he moved out of his mother's house. Kim testified that the situation culminated on October 2, 2011, when he awoke from a nightmare, with his heart racing, and had a panic attack. Kim testified that as a result of the incident, he went to the emergency room.

The compensation court did not err in finding that the October 2, 2011, emergency room visit was related to the shooting and was compensable. Gen-X's second assignment of error is without merit.

Inpatient Rehabilitation.

In its third assignment of error, Gen-X argues the compensation court erred in finding that Kim's inpatient chemical dependency treatment was compensable. In particular, Gen-X argues that the trial court failed to adequately consider Chesen's opinions and that it also failed to properly discredit Kim's testimony because of alleged inconsistencies in that testimony. Essentially, Gen-X argues that Kim was a lifelong drug abuser and would have needed inpatient treatment regardless of the shooting.

Gen-X argues that the trial court made certain incorrect findings of fact. We agree insofar as the trial court found Chesen opined that Kim had reached MMI on September 22, 2012, when in fact Chesen opined that Kim had reached MMI on February 22, 2012. And we agree the trial court's findings were incomplete in that it noted Chesen found Kim was "essentially a life-long drug abuser of recreational drugs" in a November 4, 2012, report. While Chesen did make such a finding in that report, Chesen also stated that same opinion in a February 22, 2012, report.

[7,8] But a review of the record shows that contrary to Gen-X's contention, the trial court did not rely on the timing of Chesen's opinions in reaching its ultimate conclusion. In fact, this case presents nothing more than conflicting expert opinions. And where the record presents such conflicting medical testimony, an appellate court will not substitute its judgment for that of the Workers' Compensation Court.[9] As the trier of fact, the compensation court is the sole judge of the credibility of witnesses and the weight to be given their testimony.[10]

Lubberstedt testified that Kim's prior drug use was recreational, that he was not dependent prior to the shooting and subsequent PTSD, and that the inpatient treatment was likely necessary as a result of the shooting. Chesen opined that Kim was a lifelong drug user and that his current use and inpatient treatment were not related to his PTSD diagnosis.

While Kim alternately suggested that he had or had not used particular drugs in the past, his testimony was consistent with respect to his description of that use as recreational. Lubberstedt indicated that at the time Kim began treatment, which was before Kim began to heavily self-medicate for the PTSD, Kim did not meet the definition of chemical dependency.

The trial court was entitled to give more weight to Lubberstedt's testimony than to Chesen's testimony[11] and was

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[9] *Id.*

[10] See *id.*

[11] See *id.*

the sole judge of the credibility of the witnesses.[12] As such, the compensation court did not err in concluding that the inpatient treatment was compensable. Gen-X's third assignment of error is without merit.

Future Medical Expenses.

Finally, Gen-X assigns that the compensation court erred in awarding Kim future medical expenses. Gen-X argues that Lubberstedt's testimony was insufficient to show that further medical treatment was reasonably necessary.

Gen-X's argument is without merit. A review of Lubberstedt's testimony shows that future medical treatment was reasonably necessary. Lubberstedt testified that Kim had not reached MMI. Further, Lubberstedt testified that Kim was continuing counseling and medication management with Lubberstedt's practice. At the time of trial, Kim was still seeking counseling services two to four times per month. Lubberstedt explained that eventually, Kim would "plateau" and would "likely not show a continued improvement with what we're currently doing," but that there were other options left to try. Kim's prognosis was "guarded," but Lubberstedt was "hopeful."

The trial court did not err in finding that Kim was entitled to future medical expenses. Gen-X's fourth assignment of error is without merit.

CONCLUSION

The decision of the compensation court is affirmed.

AFFIRMED.

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[12] See *id.*

STATE OF NEBRASKA, APPELLEE, V. MICHAEL W. RYAN, APPELLANT.

845 N.W.2d 287

Filed April 18, 2014. No. S-12-215.

1. **Postconviction: Appeal and Error.** In appeals from postconviction proceedings, an appellate court independently resolves questions of law.
2. ____: ____. Whether a movant has failed to state a claim for postconviction relief is a question of law.
3. **Jurisdiction: Words and Phrases.** Strictly speaking, "jurisdiction" refers to a court's adjudicatory authority. Accordingly, the term "jurisdictional" properly applies only to prescriptions delineating the classes of cases (subject matter jurisdiction) and the persons (personal jurisdiction) implicating that authority.
4. **Constitutional Law: Judgments: Postconviction: Jurisdiction.** Whether a factual circumstance exists whereby the judgment is void or voidable under the state or U.S. Constitution is an element of a claim for postconviction relief, not a jurisdictional prerequisite.
5. **Judgments: Sentences: Postconviction.** Method-of-execution claims do not challenge the underlying conviction or the sentence itself (which is the judgment in a criminal case); so, a method-of-execution claim, even if successful, would not render the judgment void or voidable, as required by Neb. Rev. Stat. § 29-3001 (Cum. Supp. 2012).

Appeal from the District Court for Richardson County: DANIEL E. BRYAN, JR., Judge. Affirmed.

James R. Mowbray and Robert W. Kortus, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

Michael W. Ryan, pro se.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and INBODY, Chief Judge.

CONNOLLY, J.

SUMMARY

Michael W. Ryan, convicted of first degree murder and sentenced to death,[1] moved for postconviction relief. The district

[1] See *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989).

court dismissed his motion without an evidentiary hearing. Because Ryan's motion failed to state a claim for postconviction relief, either because his claims were without legal basis or because they were not cognizable in postconviction, we affirm.

BACKGROUND

Factual and Procedural Background

We affirmed Ryan's conviction and sentence on direct appeal.[2] The underlying facts are long and brutal and need not be repeated here. Since our affirmance, Ryan has filed two other postconviction motions, both of which were denied.[3] Ryan also filed for federal habeas relief, which the federal courts denied.[4] We have, at various times, ordered Ryan to be executed, but each time we subsequently stayed the execution. Our last order scheduling Ryan's execution was January 11, 2012, but following Ryan's motion for postconviction relief, filed on February 13, and subsequent emergency motion for a stay, we again stayed Ryan's execution. The district court dismissed Ryan's motion without an evidentiary hearing, and he appealed.

District Court's Order Dismissing Ryan's Postconviction Motion

In its order dismissing Ryan's motion, the court set forth each of Ryan's alleged grounds for postconviction relief, which we summarize as follows:

1. The State illegally obtained stolen thiopental, in violation of Nebraska law. The State's attempt to use that drug to conduct Ryan's execution denies Ryan due process and equal protection under both the state and federal Constitutions.

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[2] See *id.*

[3] See, *State v. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999); *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766 (1995), *abrogated, State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008).

[4] See *Ryan v. Clarke*, 281 F. Supp. 2d 1008 (D. Neb. 2003), *affirmed* 387 F.3d 785 (8th Cir. 2004).

2. The State's pattern of bad faith in seeking an execution date for Ryan denies Ryan due process under both the state and federal Constitutions.
3. The Legislature passed 2009 Neb. Laws, L.B. 36, which changed Ryan's "final" sentence by mitigating the method of execution from electrocution to lethal injection, and is in violation of the Board of Pardons' exclusive commutation power and the separation of powers provisions of the state Constitution.
4. The Legislature's passing of L.B. 36 was an improper abdication and delegation of its exclusive authority to determine the particular quantity and type of drugs to be used in lethal injection, in violation of the separation of powers provisions in the state Constitution.
5. The Legislature's passing of L.B. 36 changed the method of execution to lethal injection and, along with the Nebraska Department of Correctional Services' creating a new execution protocol after Ryan's conviction became final, violates the Ex Post Facto Clauses of both the state and federal Constitutions.

In dismissing Ryan's motion, the court observed that "it [could] only enter relief in cases where a prisoner in custody under sentence assert[ed] facts that claim[ed] a right to be released on grounds that there was a denial or infringement of state or federal constitutional rights that would render the judgment of conviction void or voidable." The court characterized Ryan's alleged grounds for relief as "not deal[ing] with the judgement [sic] of the death sentence," but, rather, "deal[ing] with the method of inflicting the death penalty." Thus, the court observed, Ryan's claims were not cognizable in postconviction.[5] The court therefore dismissed Ryan's motion without an evidentiary hearing.

ASSIGNMENT OF ERROR

Ryan assigns, restated, that the district court erred in dismissing his motion for postconviction relief without an evidentiary hearing.

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[5] See, *Mata, supra* note 3; *State v. Moore*, 272 Neb. 71, 718 N.W.2d 537 (2006).

STANDARD OF REVIEW

[1,2] In appeals from postconviction proceedings, we independently resolve questions of law.[6] Whether a movant has failed to state a claim for postconviction relief is a question of law.[7]

ANALYSIS

As an initial matter, the parties dispute whether the court dismissed Ryan's motion on jurisdictional grounds. A review of the court's order suggests that the court understood its ruling to be based on jurisdictional grounds. Relying on our decision in *State v. Lotter*,[8] the court stated that Neb. Rev. Stat. § 29-3001 (Cum. Supp. 2012) limited its jurisdiction to grant postconviction relief. And because the court concluded that Ryan was not entitled to postconviction relief under § 29-3001, it dismissed his motion.

[3] In *Lotter*, citing a Nebraska Court of Appeals decision, we stated that "[a]bsent a factual circumstance whereby the judgment is void or voidable under the state or U.S. Constitution, the court has no jurisdiction to grant postconviction relief."[9] Our language, however, was imprecise. Courts, including this court,[10] have frequently used the term "jurisdiction" too loosely.[11] Strictly speaking, "'[j]urisdiction' refers to 'a court's adjudicatory authority.'"[12] "Accordingly, the term 'jurisdictional' properly applies only to 'prescriptions delineating the classes

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[6] See, e.g., *State v. Dragon*, *ante* p. 519, 843 N.W.2d 618 (2014).

[7] See *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012).

[8] *State v. Lotter*, 278 Neb. 466, 771 N.W.2d 551 (2009).

[9] *Id.* at 475, 771 N.W.2d at 559 (citing *State v. Murphy*, 15 Neb. App. 398, 727 N.W.2d 730 (2007)). See, also, *State v. Boppre*, 280 Neb. 774, 790 N.W.2d 417 (2010).

[10] See, e.g., *Nebraska Republican Party v. Gale*, 283 Neb. 596, 812 N.W.2d 273 (2012).

[11] See, e.g., *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006); *State v. Armstrong*, 146 Idaho 372, 195 P.3d 731 (Idaho App. 2008).

[12] *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 160, 130 S. Ct. 1237, 176 L. Ed. 2d 18 (2010).

of cases (subject matter jurisdiction) and the persons (personal jurisdiction)' implicating that authority."[13] Here, the court clearly had both.

[4] Whether a factual circumstance exists whereby the judgment is void or voidable under the state or U.S. Constitution is an element of a claim for postconviction relief, not a jurisdictional prerequisite. Thus, where such a circumstance is lacking, the proper course is to dismiss for failure to state a claim, not for lack of jurisdiction. And here, despite the labeling confusion, that is effectively what the court did. We review de novo that determination.[14]

[5] As set forth above, Ryan's motion contained five claims for postconviction relief. The district court characterized all of Ryan's claims as "deal[ing] with the method of inflicting the death penalty." If that characterization is correct, Ryan's claims would not be cognizable in postconviction.[15] This is because such claims do not challenge the underlying conviction or the sentence itself (which is the judgment in a criminal case[16]); so, a method-of-execution claim, even if successful, would not render the judgment void or voidable, as required by § 29-3001(1).[17]

We agree with the court's characterization with one exception. Ryan's second claim challenges whether the State can put him to death *at all*, no matter the method. Ryan argues that the State, through its alleged dilatory conduct and scheduling of "sham executions," violated his due process rights and effectively forfeited its right to execute him.[18] This claim is not a method-of-execution claim. Nevertheless, on our de novo review, we conclude that this claim does not state a claim for

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[13] *Id.*, 559 U.S. at 160-61.

[14] See *Edwards, supra* note 7.

[15] See *Moore, supra* note 5.

[16] See, e.g., *State v. Jiminez*, 283 Neb. 95, 808 N.W.2d 352 (2012).

[17] See *Moore, supra* note 5.

[18] See brief for appellant at 33.

postconviction relief. Despite Ryan's argument to the contrary, his claim appears to be similar to the claim we rejected in *State v. Moore*.[19] And the only authority he provides for his claim is either inapposite or not authority at all.[20]

As for Ryan's other four claims, we agree with the court's characterization: they are method-of-execution claims. Ryan agrees that the first claim is a method-of-execution claim, but disagrees as to the other three. Our review of his motion and brief, however, indicates that they too are method-of-execution claims. Ryan's third claim alleges that the Legislature improperly commuted his sentence "by mitigating the method of execution from electrocution to lethal injection." Ryan's fourth claim alleges that the Legislature improperly delegated its responsibility "to determine the particular quantity and type of drug(s) to be used in lethal injection" to the executive branch. And Ryan's fifth claim alleges that the change to lethal injection violated the ex post facto provisions of the federal and state Constitutions. Each of these claims takes issue (in different ways) with the method of execution, not the sentence of death. Thus, they are method-of-execution claims.

As the court recognized, we held in *State v. Moore* that such claims are not cognizable in postconviction.[21] There, the defendant's petition for postconviction relief challenged the electrocution protocol for implementing the death penalty. We observed that the defendant's petition did not challenge "either

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[19] *State v. Moore*, 256 Neb. 553, 591 N.W.2d 86 (1999).

[20] See, *Baze v. Rees*, 553 U.S. 35, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008) (citing *Francis v. Resweber*, 329 U.S. 459, 67 S. Ct. 374, 91 L. Ed. 422 (1947)); *Johnson v. Bredesen*, 558 U.S. 1067, 130 S. Ct. 541, 175 L. Ed. 2d 552 (2009) (Stevens, J., statement respecting denial of certiorari; Breyer, J., joins); *Thompson v. McNeil*, 556 U.S. 1114, 129 S. Ct. 1299, 173 L. Ed. 2d 693 (2009) (Stevens, J., statement respecting denial of certiorari); *Lackey v. Texas*, 514 U.S. 1045, 115 S. Ct. 1421, 131 L. Ed. 2d 304 (1995) (Stevens, J., memorandum respecting denial of certiorari; Breyer, J., agrees).

[21] *Moore*, *supra* note 5.

his underlying conviction or the judgment of a sentence of death."[22] We concluded, after reviewing the U.S. Supreme Court's cases in *Nelson v. Campbell*[23] and *Hill v. McDonough*,[24] that the defendant's claim was not cognizable in postconviction, which is reserved for claims which would render the judgment void or voidable.[25]

We logically reaffirmed that holding in several cases since; namely, in *State v. Torres*,[26] *State v. Ellis*,[27] and *State v. Mata*,[28] in which we held that the method of execution is separate from the sentence of death. Though those cases arose on direct appeal, it follows that because the method of execution is separate from the sentence, a challenge to the method of execution would not render the sentence void or voidable. So, such challenges are not cognizable in postconviction.

But Ryan seeks to change our law, or at least how it applies in this particular case. Ryan argues that *State v. Moore* was wrong, in that it misinterpreted the U.S. Supreme Court's decisions in *Nelson* and *Hill* and incorrectly held that method-of-execution claims could not be brought in postconviction. Ryan also argues that *Moore* is no longer controlling because there have been changes in Nebraska's laws regarding the death penalty, which under the reasoning of *Nelson* and *Hill*, affect whether a method-of-execution claim is cognizable in postconviction.

Ryan relies on *Nelson* and *Hill*, both of which address the proper avenue (federal habeas or 42 U.S.C. § 1983 (2006))

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[22] *Id.* at 78, 718 N.W.2d at 543.

[23] *Nelson v. Campbell*, 541 U.S. 637, 124 S. Ct. 2117, 158 L. Ed. 2d 924 (2004).

[24] *Hill v. McDonough*, 547 U.S. 573, 126 S. Ct. 2096, 165 L. Ed. 2d 44 (2006).

[25] See *Moore*, *supra* note 5.

[26] *State v. Torres*, 283 Neb. 142, 812 N.W.2d 213 (2012), *cert. denied* ___ U.S. ___, 133 S. Ct. 244, 184 L. Ed. 2d 129.

[27] *State v. Ellis*, 281 Neb. 571, 799 N.W.2d 267 (2011).

[28] *Mata*, *supra* note 3.

for bringing particular method-of-execution claims in federal court. We first note that we, like Ryan, agree that these cases are informative here. Both cases involved method-of-execution claims. Both cases noted that claims challenging the fact of the conviction or the duration of the sentence must be brought in federal habeas because they fall within the "core" of habeas corpus.[29] Such claims, by analogy, would be cognizable in postconviction because, if meritorious, they would render the judgment void or voidable. And in both cases, the Court discussed circumstances leading it to conclude that the particular claim did not attack the conviction or sentence and therefore was proper under § 1983.[30] Because of Ryan's reliance on *Nelson* and *Hill*, we believe it helpful to set out in depth the facts and reasoning from both cases.

In *Nelson v. Campbell*, the petitioner, through § 1983, challenged a particular aspect of Alabama's lethal injection protocol.[31] Specifically, the petitioner challenged Alabama's use of a "'cut-down'" procedure to access his veins as cruel and unusual under the Eighth Amendment. The issue was whether § 1983 was the appropriate avenue to bring the claim or whether it sounded in federal habeas.[32]

The U.S. Supreme Court first noted that a prisoner must bring his claim in federal habeas when it challenges "the fact of his conviction or the duration of his sentence," but that he may bring his claim in § 1983 when it "merely challenge[s] the conditions of [his] confinement."[33] After observing that it had not yet had occasion to consider how to characterize a method-of-execution claim, the Court explained that it was not a simple matter:

> Neither the "conditions" nor the "fact or duration" label is particularly apt. A suit seeking to enjoin a particular

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[29] See, *Hill*, *supra* note 24; *Nelson*, *supra* note 23.

[30] See *id.*

[31] *Nelson*, *supra* note 23.

[32] *Id.*, 541 U.S. at 639.

[33] *Id.*, 541 U.S. at 643.

> means of effectuating a sentence of death does not directly call into question the "fact" or "validity" of the sentence itself—by simply altering its method of execution, the State can go forward with the sentence. . . . On the other hand, imposition of the death penalty presupposes a means of carrying it out. In a State such as Alabama, where the legislature has established lethal injection as the preferred method of execution, . . . a constitutional challenge seeking to permanently enjoin the use of lethal injection may amount to a challenge to the fact of the sentence itself. A finding of unconstitutionality would require statutory amendment or variance, imposing significant costs on the State and the administration of its penal system. And while it makes little sense to talk of the "duration" of a death sentence, a State retains a significant interest in meting out a sentence of death in a timely fashion.[34]

The Court, however, concluded that "[w]e need not reach here the difficult question of how to categorize method-of-execution claims generally."[35] It reasoned that, had the cut-down procedure been used for some other purpose than to execute the petitioner (say, for medical treatment), a claim that such a procedure was unconstitutional would sound in § 1983. The Court saw no reason to treat the claim differently just because it was a precursor to an execution. Moreover, the court observed that the cut-down procedure was not statutorily mandated and that the petitioner conceded there were acceptable alternatives to gain access to his veins.[36] Had that not been the case, however, the Court noted that he "might have a stronger argument that success on the merits, coupled with injunctive relief, would call into question the death sentence itself."[37] The Court concluded that in those particular

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[34] *Id.*, 541 U.S. at 644.

[35] *Id.*

[36] *Id.*

[37] *Id.*, 541 U.S. at 645.

circumstances, the petitioner's claim was cognizable under § 1983.[38]

In *Hill v. McDonough*, the petitioner, again through § 1983, challenged the constitutionality of a three-drug sequence likely to be used by Florida to execute him.[39] *Hill* presented the same basic issue as in *Nelson*: whether the claim should be brought as a federal habeas claim or as a § 1983 claim.[40]

After setting forth the general propositions regarding when a claim sounds in federal habeas as opposed to § 1983, the Court looked toward its earlier decision in *Nelson*. The Court stated that the issue in *Nelson* was "whether a challenge to a lethal injection procedure must proceed as a habeas corpus action" and that "*Nelson* did not decide this question."[41] The Court emphasized that *Nelson* was not required to answer that question because "[t]he lawsuit at issue, as the Court understood the case, did not require an injunction that would challenge the sentence itself."[42] And the Court later stated again that "[t]he suit [in *Nelson*] did not challenge an execution procedure required by law, so granting relief would not imply the unlawfulness of the lethal injection sentence."[43]

The Court concluded that the same was true in *Hill*: "Here, as in *Nelson*, [the petitioner's] action if successful would not necessarily prevent the State from executing him by lethal injection."[44] The Court observed that the complaint did not generally challenge the death sentence but only the manner in which Florida intended to execute him. Notably, the petitioner conceded that there were other constitutional ways to execute him. And it appeared that even if the petitioner received the requested injunction, it would not "leave the State without any

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[38] *Id.*

[39] *Hill*, *supra* note 24.

[40] See *id.*

[41] *Id.*, 547 U.S. at 579.

[42] *Id.*

[43] *Id.*, 547 U.S. at 580.

[44] *Id.*

other practicable, legal method of executing [the petitioner] by lethal injection."[45] The Court also observed that "Florida law [did] not require the department of corrections to use the challenged procedure."[46] Thus, the petitioner's "challenge appear[ed] to leave the State free to use an alternative lethal injection procedure."[47] Under those circumstances, the Court concluded that § 1983 was an appropriate vehicle for the petitioner to bring his claim.

Based on Ryan's appellate brief, and as we understand it, he first argues that neither *Nelson* nor *Hill* hold that method-of-execution claims *must* be brought under § 1983. Instead, *Nelson* and *Hill* hold only that § 1983 was a proper avenue (but not necessarily the only one) to bring those particular claims, because they did not fall within the "core" of habeas corpus. Ryan argues that nothing would have prevented those claims from being brought as a federal habeas claim. In other words, Ryan argues that method-of-execution claims, even if proper under § 1983, can also be brought in federal habeas. To the extent that *Moore* concluded otherwise, Ryan claims we erred.

We first note that whether Ryan's position is correct is unclear. The federal circuit courts, following *Nelson* and *Hill*, are split on whether method-of-execution claims must be brought under § 1983.[48] And more broadly, the federal circuit courts are split on the overlap, if any, between habeas corpus and § 1983. While it is clear that a claim which falls within the "core" of habeas corpus is not cognizable under § 1983,[49] what is not so clear is whether a claim that is cognizable under § 1983 (falling outside the "core" of habeas corpus) may still be brought in federal habeas; in other words, whether federal habeas is *limited* to "core" claims. The U.S. Supreme Court

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[45] *Id.*

[46] *Id.*

[47] *Id.*, 547 U.S. at 580-81.

[48] Compare, e.g., *Adams v. Bradshaw*, 644 F.3d 481 (6th Cir. 2011), with *Tompkins v. Secretary, Dept. of Corrections*, 557 F.3d 1257 (11th Cir. 2009), and *Rachal v. Quarterman*, 265 Fed. Appx. 371 (5th Cir. 2008).

[49] See *Nelson*, *supra* note 23.

has not answered that question.[50] And the federal circuit courts are split on that issue.[51]

More important, even assuming Ryan is correct, we fail to see how this is relevant to whether Ryan's claims are cognizable in postconviction. If a claim is proper under both federal habeas and § 1983, then it is not proper under postconviction. This is because a claim which could be brought under both federal habeas and § 1983 falls outside the "core" of habeas corpus. That is, it does not attack the fact of the conviction or the duration of the sentence.[52] Such a claim, even if meritorious, would not render the judgment void or voidable, as § 29-3001 requires. Only a claim which falls within the "core" of habeas corpus could be cognizable in postconviction; so whether a method-of-execution claim that is proper under § 1983 is also proper under federal habeas is irrelevant to the issue at hand.

Ryan also argues that *Nelson* and *Hill* implied that under certain circumstances, a method-of-execution claim could be viewed as an attack on the sentence itself. If that were so, then the claim would fall within the "core" of habeas corpus and, by analogy, would be cognizable in postconviction. Ryan argues that *Nelson* and *Hill* outlined what those circumstances would be; essentially, where the challenged method of execution is statutorily mandated and, as a result, the State has no practicable alternative procedure to implement the death penalty. Ryan argues that those circumstances are present here, where the procedure is effectively mandated by statute,[53] and that if the State were restrained from executing him under the current protocol, it would be unable to easily implement an alternative lethal injection procedure. This was not the case in *Moore*, so Ryan argues that it does not control and that

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[50] See *Aamer v. Obama*, 742 F.3d 1023 (D.C. Cir. 2014).

[51] See *id.* (collecting cases). Compare, also, *McNabb v. Commissioner Ala. Dept. of Corrections*, 727 F.3d 1334 (11th Cir. 2013), with *Docken v. Chase*, 393 F.3d 1024 (9th Cir. 2004).

[52] See *Nelson*, *supra* note 23.

[53] See *Lariat Club v. Nebraska Liquor Control Comm.*, 267 Neb. 179, 673 N.W.2d 29 (2004).

because his claims are effectively attacks on his sentence, they are cognizable in postconviction.

We disagree. We acknowledge that *Nelson* and *Hill* intimated that, under certain circumstances, a method-of-execution challenge might be considered an attack on the sentence (and therefore cognizable only in federal habeas, and by analogy, in postconviction).[54] But although the Court intimated that, it did not explicitly hold that. Instead, in *Nelson*, the Court stated that if the challenged procedure were statutorily required, there "*might* [be] a stronger argument that success on the merits, coupled with injunctive relief, would call into question the death sentence itself."[55] And in *Hill*, the Court noted that under the circumstances, "injunctive relief *could not be seen* as barring the execution of [the petitioner's] sentence," and later noted that "[i]f the relief sought would foreclose execution, recharacterizing a complaint as an action for habeas corpus *might* be proper."[56] So, we do not see *Nelson* and *Hill* as clearly holding that where the challenged procedure is statutorily mandated, a method-of-execution claim is effectively an attack on the sentence.

More important, regardless what the U.S. Supreme Court has intimated in *Nelson* and *Hill*, we continue to adhere to the view that a method-of-execution claim cannot be considered an attack on the sentence itself. To be sure, as the Court stated in *Nelson*, "imposition of the death penalty presupposes a means of carrying it out," and when a procedure is statutorily required and found unconstitutional, replacing it with a constitutional one "impos[es] significant costs on the State and the administration of its penal system."[57] And it is also true that the State "retains a significant interest in meting out a sentence of death in a timely fashion."[58]

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[54] See, *Hill, supra* note 24; *Nelson, supra* note 23.

[55] *Nelson, supra* note 23, 541 U.S. at 645 (emphasis supplied).

[56] *Hill, supra* note 24, 547 U.S. at 581-82 (emphasis supplied).

[57] *Nelson, supra* note 23, 541 U.S. at 644.

[58] *Id.*

But that does not change the fact that the death penalty, properly imposed, is plainly constitutional.[59] Nor does it change the fact that a method-of-execution claim "does not directly call into question the 'fact' or 'validity' of the sentence itself—by simply altering its method of execution, the State can go forward with the sentence."[60] Granted, if it's statutorily required (as it effectively is here), it would take some time to adopt a new procedure; but in our view, that does not affect the validity of the sentence, only the time it takes to carry it out. And unless and until the U.S. Supreme Court clearly holds otherwise, on a constitutional basis, we will continue to follow our holdings in *Moore* (and *Torres*, *Ellis*, and *Mata*) that a method-of-execution claim, even if successful, would not render the judgment void or voidable. Such claims are therefore not cognizable in postconviction.

CONCLUSION

We affirm the district court's order dismissing Ryan's motion without an evidentiary hearing, because Ryan's motion failed to state a claim for postconviction relief. Ryan's second claim had no legal basis, and Ryan's other claims were method-of-execution claims, which were not cognizable in postconviction.

AFFIRMED.

CASSEL, J., not participating.

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[59] See, e.g., *Kansas v. Marsh*, 548 U.S. 163, 126 S. Ct. 2516, 165 L. Ed. 2d 429 (2006).

[60] *Nelson*, *supra* note 23, 541 U.S. at 644.

In re Complaint Against Gregory M. Schatz, District Court Judge of the Fourth Judicial District of the State of Nebraska. State of Nebraska ex rel. Commission on Judicial Qualifications, relator, v. Gregory M. Schatz, respondent.

845 N.W.2d 273

Filed April 18, 2014. No. S-13-139.

1. **Judges: Disciplinary Proceedings: Appeal and Error.** In a review of the findings and recommendations of the Commission on Judicial Qualifications, the Nebraska Supreme Court shall review the record de novo and file a written opinion and judgment directing action as it deems just and proper, and may reject or modify, in whole or in part, the commission's recommendation.
2. ____: ____: ____. In a review of the findings and recommendations of the Commission on Judicial Qualifications, upon its independent inquiry, the Nebraska Supreme Court must determine whether the charges against the respondent are supported by clear and convincing evidence and which, if any, canons of the Nebraska Code of Judicial Conduct and subsections of Neb. Rev. Stat. § 24-722 (Reissue 2008) have been violated.
3. ____: ____: ____. If violations of the Nebraska Code of Judicial Conduct and subsections of Neb. Rev. Stat. § 24-722 (Reissue 2008) are found, the Nebraska Supreme Court must then determine what discipline, if any, is appropriate under the circumstances.

Original action. Judgment of public reprimand.

Anne E. Winner for relator.

Thomas F. Hoarty, Jr., of Byam & Hoarty, for respondent.

Wright, Connolly, Stephan, McCormack, Miller-Lerman, and Cassel, JJ.

Per Curiam.

This is a judicial misconduct case. Gregory M. Schatz, a district judge for the Fourth Judicial District, improperly intervened in a case involving his friend, Michael Davlin, by ordering him released from jail on his own recognizance before arraignment. Both the appointed special master and the Commission on Judicial Qualifications (Commission) recommended publicly reprimanding Schatz. Because of the nature

of the misconduct and the presence of several mitigating circumstances, we agree with their recommendation and hereby publicly reprimand Schatz.

BACKGROUND

The Commission's complaint against Schatz charged him with misconduct in violation of the Nebraska Code of Judicial Conduct, the Nebraska Constitution,[1] and Neb. Rev. Stat. § 24-722(6) (Reissue 2008). In essence, the complaint alleged that Schatz had improperly intervened in a felony drunk driving case by contacting the jail and using his judicial authority to instruct the personnel to release his friend Davlin without paying a bond.

In his amended answer, Schatz admitted to the majority of the complaint's allegations. Schatz also affirmatively alleged that he understood he had been wrong to intervene in Davlin's case, that he had no further involvement in Davlin's case since contacting the jail, and that he would not intervene in any such matter in the future. Schatz alleged that he had acted without any improper motive and that, when he contacted the jail, he believed that a recognizance bond was proper. Schatz also affirmatively alleged that he had since taken a judicial ethics course, that he had never before received any disciplinary sanctions, and that he generally had a good reputation with members of the bar and voters in his area.

We appointed the Honorable Jeffre Cheuvront, a retired district court judge, to serve as special master. At the hearing before the special master, Schatz testified that he had received a voice mail message late at night from Davlin's girlfriend (also Schatz' friend) explaining what had happened to Davlin and that he was in jail. Schatz testified that he listened to the voice mail early the next morning, that he called Davlin's girlfriend back around 7 a.m., and that he told her he would "see what [he] could do." Schatz testified that he then called the jail, explained who he was, and told them to release Davlin on his own recognizance.

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[1] Neb. Const. art. V, § 30.

Schatz testified that after he left for work, he felt he had made a mistake and immediately went to see Donald Kleine, the Douglas County Attorney. Schatz met with Kleine about an hour after Schatz' telephone call to the jail. Schatz told Kleine what he had done and that he was sorry. The record shows that Kleine had a policy in felony drunk driving cases to not participate in setting a bond until arraignment before a county judge. Schatz testified that he was unaware of that policy, but now being aware of it, he intended to follow it in the future. Schatz testified that he understood he had made a mistake, that he had successfully completed a judicial ethics course, and that he had not been disciplined in the past. Schatz also offered into evidence many letters in support of his character and overall competence.

Other witnesses' testimony corroborated and expanded on Schatz' testimony. The jail employee whom Schatz spoke with that morning testified that Schatz called the jail around 7:15 a.m. She verified it was Schatz through his identification code and then set Davlin's release in motion, as Schatz requested. The jail employee testified that although that was not normally how things were done, she had to follow a judge's orders.

Kleine testified that before he became county attorney, there was a policy or custom where, in felony drunk driving cases, bond could be set early, before arraignment. But that changed when Kleine became county attorney, and in such cases, his policy was to not participate in setting a bond until arraignment before a county judge. Kleine also testified about the conversation with Schatz. Kleine described Schatz as apologetic, and after Kleine reviewed Davlin's arrest report, he explained to Schatz his policy and that he did not think Schatz' mistake would affect the progression of the case.

The Honorable Susan Bazis, a county judge, also testified. Bazis explained that two other county judges informed her of Schatz' involvement in Davlin's case. Bazis testified that several days after Davlin's release, she met with Schatz about the incident. Bazis testified that she told Schatz she thought he may have violated the judicial code and that she felt obligated to report it if he did not, and she did in fact do so. Bazis

testified that Schatz was not "at all" defensive when she came to him, that he later apologized to her for putting her in that position, and that she respected him as a judge.

Matt Kuhse, a deputy county attorney, also briefly testified. He testified that Davlin would not have been released early but for Schatz' intervention, that Kuhse would not have agreed to an initial recognizance bond, that subsequent judges continued Davlin's recognizance bond, and that Schatz had a good reputation. Stuart Dornan, a local attorney, similarly testified regarding Schatz' reputation, and he testified about the policy regarding bond setting in felony drunk driving cases before Kleine became county attorney.

The special master's factual findings generally tracked the testimony set forth above, as there was no real dispute as to what happened. Based on those factual findings, the special master found that Schatz had violated several provisions of the judicial code and that he had violated the Nebraska Constitution and § 24-722(6). The special master then noted that Schatz had admitted his wrongdoing and had "expressed genuine remorse for his conduct." The special master also observed that this was an isolated incident unlikely to recur and that all the witnesses (and support letters offered into evidence) praised Schatz' abilities and integrity. In light of those circumstances, the special master felt the appropriate sanction was "no more than a public reprimand."

The Commission, after independently reviewing the record and hearing argument, adopted the special master's factual findings and likewise recommended a public reprimand. Schatz subsequently filed a "Consent to Reprimand," and we ordered both the Commission and Schatz to submit briefs on whether the Commission's proposed disposition was just, proper, and consistent with prior dispositions involving similar misconduct.

STANDARD OF REVIEW

[1-3] In a review of the findings and recommendations of the Commission, this court shall review the record de novo and file a written opinion and judgment directing action as it deems just and proper, and may reject or modify, in whole

or in part, the Commission's recommendation.[2] Upon our independent inquiry, we must determine whether the charges against the respondent are supported by clear and convincing evidence and which, if any, canons of the Code and subsections of § 24-722 have been violated.[3] If violations are found, we must then determine what discipline, if any, is appropriate under the circumstances.[4]

ANALYSIS

Our first task in judicial misconduct cases is to determine whether there is clear and convincing evidence to support the charges.[5] Here, there is. There is essentially no dispute that Schatz used his judicial authority to order the release of Davlin without Davlin's paying a bond. The record shows that Schatz' actions were not in accord with how bonds were normally set in felony drunk driving cases. Specifically, the record shows that without Schatz' intervention, Davlin would have remained in jail until his arraignment in county court, when presumably either he would have been released on his own recognizance or a monetary bond would have been set. In the latter and more probable circumstance, Davlin would have been held in jail until he posted bond.

Based on these facts, we agree with both the special master and the Commission that Schatz primarily violated the following provisions of the Nebraska Revised Code of Judicial Conduct: § 5-301.2 (judge shall act to promote confidence in judiciary and avoid impropriety and appearance of impropriety), § 5-301.3 (judge shall not abuse office to advance personal interests), § 5-302.4(B) (judge shall not allow personal interests or relationships to influence judicial conduct or judgment), and § 5-302.9(A) (judge shall not, except for certain limited situations, have ex parte communications or

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[2] See *In re Complaint Against Florom*, 280 Neb. 192, 784 N.W.2d 897 (2010).

[3] See *id.*

[4] See *id.*

[5] See *In re Complaint Against Lindner*, 271 Neb. 323, 710 N.W.2d 866 (2006).

communications outside presence of parties or their lawyers concerning pending or impending matter). We also agree that Schatz' actions constituted willful misconduct prejudicial to the administration of justice that brings the judicial office into disrepute.[6]

Our second task is to determine the appropriate sanction for Schatz' misconduct.[7] We note that both the special master and the Commission independently determined that under the circumstances, a public reprimand was the appropriate sanction. While we give some weight to these recommendations, we must review the record ourselves and come to our own conclusions as to the proper sanction.[8]

In doing so, we find it useful to look at past cases involving judicial misconduct. Admittedly, as the Commission noted in its brief, prior cases do not involve the same type of misconduct present here. Nevertheless, we believe that parallels may be drawn and comparisons made, and that by doing so, we may be consistent in imposing discipline for judicial misconduct. Moreover, a look at prior cases, regardless whether the misconduct is of the same type, provides guidance as to the general principles and factors we look at in determining the proper discipline.

For example, in *In re Complaint Against White*,[9] we suspended a county judge without pay for her actions in trying to obtain appellate review of a district court decision reversing one of her orders. Over the course of several months, the judge met with the deputy county attorney several times; provided her with case law and reasons why the district court's order was allegedly incorrect; asked the district court to appoint a special prosecutor to appeal the decision; and, through personal counsel, later filed her own petition to appoint a special county

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[6] See, Neb. Const. art. V, § 30; § 24-722(6).

[7] See *In re Complaint Against Lindner, supra* note 5.

[8] See, e.g., *In re Complaint Against White*, 264 Neb. 740, 651 N.W.2d 551 (2002); *In re Complaint Against Jones*, 255 Neb. 1, 581 N.W.2d 876 (1998).

[9] *In re Complaint Against White, supra* note 8.

attorney to render an advisory opinion on the correctness of the court's decision.[10]

And in *In re Complaint Against Florom*,[11] we removed a county judge from office for his repeated and flagrant intervention, over several months, in two cases involving his personal acquaintances. There, the judge threatened reprisal against a practicing attorney if he were to act against the judge's interests, repeatedly made known his personal interest in the cases to various lawyers, and "invoked his judicial office repeatedly in serving as a character reference for a convicted criminal,"[12] in violation of the judicial code.

Schatz' misconduct comes nowhere close to the level of impropriety in *In re Complaint Against White* and *In re Complaint Against Florom*, or in other cases where we have ordered suspension or removal from office.[13] Further, we note that the record shows that Schatz' misconduct had no effect (outside of the obvious) on the progression or outcome of Davlin's case. And we note that Schatz' misconduct, while clearly improper, was an isolated incident; there was no pattern of misconduct.[14]

Also, there are mitigating circumstances. After calling the jail, Schatz immediately recognized he had made a mistake, met with Kleine to tell him what he had done, and was apologetic.[15] Schatz, since being appointed to the bench in 2000, has never before been disciplined.[16] After recognizing what he had done was improper, and in an effort to improve his understanding of judicial ethics, Schatz enrolled in and completed

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[10] See *id.*

[11] *In re Complaint Against Florom*, *supra* note 2.

[12] *Id.* at 203, 784 N.W.2d at 905-06.

[13] See, e.g., *In re Complaint Against Krepela*, 262 Neb. 85, 628 N.W.2d 262 (2001).

[14] Compare *id.*, with *In re Complaint Against Jones*, *supra* note 8, and *In re Complaint Against Staley*, 241 Neb. 152, 486 N.W.2d 886 (1992).

[15] Cf. *In re Complaint Against Reagan*, No. S-35-030003 (Neb. Comm. on Jud. Qual. June 2, 2003).

[16] See, *In re Complaint Against Lindner*, *supra* note 5; *In re Complaint Against White*, *supra* note 8.

a judicial ethics course.[17] We note too that Schatz has, at all times, cooperated with the Commission.[18] Finally, the record shows that Schatz, outside of this incident, has served the public well as a judge, a factor to be considered in determining the appropriate discipline.[19]

After considering our case law and the particular circumstances here, we agree with both the special master and the Commission that a public reprimand is appropriate. We recognize that the misconduct here does not necessarily match up with that of prior cases where a public reprimand was issued.[20] But a harsher sanction is unwarranted, because Schatz' misconduct is much less severe than in cases where we have ordered suspension or removal from office[21] and there are several mitigating circumstances.

CONCLUSION

Schatz improperly exercised his judicial authority for Davlin, a friend. Such misconduct cannot be condoned. Both the special master and the Commission suggested that a public reprimand was the appropriate sanction. Considering the nature of the misconduct and the various mitigating circumstances, we agree.

JUDGMENT OF PUBLIC REPRIMAND.

HEAVICAN, C.J., not participating.

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[17] See *In re Complaint Against Lindner, supra* note 5 (citing *In re Complaint Against Swartz*, No. S-35-000003 (Neb. Comm. on Jud. Qual. Sept. 8, 2000)).

[18] See *id.* (citing *In re Complaint Against Huber*, No. S-35-050003 (Neb. Comm. on Jud. Qual. Aug. 11, 2005)).

[19] See *In re Complaint Against Krepela, supra* note 13.

[20] See, e.g., *In re Complaint Against Lindner, supra* note 5.

[21] See, *In re Complaint Against Florom, supra* note 2; *In re Complaint Against White, supra* note 8; *In re Complaint Against Krepela, supra* note 13.

ROLAND JOHNSON AND KAREN JOHNSON, TRUSTEES OF THE ROLAND AND KAREN JOHNSON TRUST, APPELLEES, V. CITY OF FREMONT, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT.

845 N.W.2d 279

Filed April 18, 2014. No. S-13-668.

1. **Summary Judgment.** Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
3. **Special Assessments: Municipal Corporations: Appeal and Error.** The power and authority delegated to municipalities to construct improvements and to levy special assessments for their payment is strictly construed, and every reasonable doubt as to the extent or limitation of such power and authority and the manner of exercise thereof is resolved in favor of the taxpayer.
4. **Statutes: Legislature: Intent.** In order for a court to inquire into a statute's legislative history, the statute in question must be open to construction, and a statute is open to construction when its terms require interpretation or may reasonably be considered ambiguous.
5. **Statutes: Appeal and Error.** The language of a statute is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
6. ____: ____. Absent anything to the contrary, an appellate court will give statutory language its plain and ordinary meaning.
7. ____: ____. When construing a statute, an appellate court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
8. **Statutes.** It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute.
9. ____. A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.
10. **Summary Judgment.** Summary judgment is proper where the facts are uncontroverted and the moving party is entitled to judgment as a matter of law.
11. **Summary Judgment: Final Orders: Appeal and Error.** Although the denial of a motion for summary judgment, standing alone, is not a final, appealable order, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those

motions or make an order specifying the facts which appear without substantial controversy and direct such further proceedings as it deems just.

Appeal from the District Court for Dodge County: GEOFFREY C. HALL, Judge. Reversed and remanded with direction.

Paul A. Payne for appellant.

Steven G. Ranum and Martin P. Pelster, of Croker, Huck, Kasher, DeWitt, Anderson & Gonderinger, L.L.C., for appellees.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

CASSEL, J.

INTRODUCTION

A city relied upon Nebraska's "gap and extend" law[1] to pave one block of a street and assess the paving costs against abutting property owners. At one end, the new paving adjoined a paved intersection of two paved streets. At the other end, there was no connecting paved street. We must decide whether the paving was authorized under the second sentence of § 18-2001, which permitted the city to "pave any unpaved street . . . which intersects a paved street for a distance of not to exceed one block on either side of such paved street." Because the plain language of the statute authorized the paving, we reverse the judgment of the district court and remand the cause with direction.

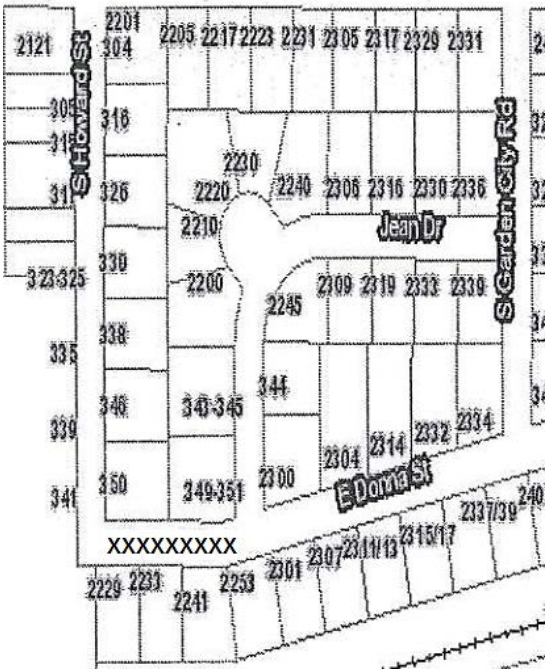
BACKGROUND

The relevant streets are located in the City of Fremont, Nebraska (City). An excerpt from a map in evidence will best illustrate the situation, both before and after the project which is the subject of the instant appeal. We note that the quality of the image, although limited by its source, still provides a useful reference tool.

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[1] See Neb. Rev. Stat. §§ 18-2001 to 18-2005 (Reissue 2012).

We first identify the extent of previous paving of relevant streets. On the east end of the map, Garden City Road was previously paved. A portion of Donna Street, from the Garden City Road intersection to the Jean Drive intersection, was also already paved. The paved segment of Donna Street ran parallel to a railroad right-of-way (lower right corner). Jean Drive was entirely paved, including both the Garden City Road and Donna Street intersections. On the west end of the map, a portion of Howard Street was previously paved, but this paving ended well north of the intersection of Howard and Donna Streets.



Again referring to the map, the contested segment of paving on Donna Street (which we have marked with X's) extended one block west from the intersection of Donna Street and Jean Drive. Thus, the east end of the segment connected to the paved intersection of Donna Street and Jean Drive. On the west end, the new pavement ended where it reached the unpaved intersection with Howard Street. Thus, at the

west end, the newly paved segment does not connect to any other paving.

Roland Johnson and Karen Johnson, trustees of the Roland and Karen Johnson Trust (trustees), who initiated the lawsuit now before us, are the legal titleholders of real estate in the City. Their property abuts upon and is adjacent to Donna Street.

In August 2009, the mayor and city council of the City passed a resolution creating "Improvement Unit No. 97." The resolution stated that under the authority granted in §§ 18-2001 to 18-2003, the City would pave a portion of Donna Street beginning at the west margin of Jean Drive. The resolution stated that Donna Street was an unpaved street and that it intersected a paved street. The City subsequently passed a resolution which levied a special tax and assessment upon certain parcels of real estate—including the trustees' property—to pay the costs of Improvement Unit No. 97.

The trustees filed a petition on appeal, alleging that the levy of special assessments was invalid. They claimed that the street improvement in Improvement Unit No. 97 did not fill an unpaved gap between paved streets, but, rather, merely extended the paving on Donna Street. The trustees requested an order vacating the special assessments levied upon the property and a refund of the special assessment they had paid. In the City's answer, it stated that Donna Street intersects with South Howard Street one block west of Jean Drive. The City admitted that Improvement Unit No. 97 extended the paving on Donna Street and claimed such action was authorized under the unambiguous language of § 18-2001.

Upon the parties' cross-motions for summary judgment, the district court sustained the trustees' motion and overruled the City's motion. The court observed that the parties argued different interpretations of the same factual scenario. The court stated that it found *Turner v. City of North Platte*[2] to be compelling, and the court then quoted the following language that can be found in *Iverson v. City of North Platte*[3]: "It is clear

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[2] *Turner v. City of North Platte*, 203 Neb. 706, 279 N.W.2d 868 (1979).

[3] *Iverson v. City of North Platte*, 243 Neb. 506, 514, 500 N.W.2d 574, 579 (1993).

that the Legislature intended that the gap and extend procedure be used only to fill one- or two-block unpaved gaps which exist between paved streets." The court stated that Donna Street extended in the direction of an unpaved area and did not connect with or fill a gap with a paved intersection. Thus, the court concluded that the City did not "comport with the limitations and restrictions required by the gap and extend law." The court ordered the City to refund to the trustees the assessment payments they had made.

The City timely appealed, and we moved the case to our docket under our statutory authority to regulate the caseloads of the appellate courts of this state.[4]

ASSIGNMENTS OF ERROR

The City assigns that the district court erred in (1) sustaining the trustees' motion for summary judgment, (2) finding the City exceeded the limitations imposed by §§ 18-2001 to 18-2003, (3) finding the assessments against the trustees' properties arising from Improvement Unit No. 97 were invalid, (4) failing to properly define the statutory scheme and interpret the law and statutes, and (5) using a point not necessary to be passed on in *Iverson v. City of North Platte*[5] as authority in this case.

STANDARD OF REVIEW

[1] Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[6]

[2] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.[7]

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[4] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

[5] *Iverson, supra* note 3.

[6] *Harris v. O'Connor, ante* p. 182, 842 N.W.2d 50 (2014).

[7] *Hess v. State, ante* p. 559, 843 N.W.2d 648 (2014).

ANALYSIS

[3] At the outset, we recall that the power and authority delegated to municipalities to construct improvements and to levy special assessments for their payment is strictly construed, and every reasonable doubt as to the extent or limitation of such power and authority and the manner of exercise thereof is resolved in favor of the taxpayer.[8]

The crux of this appeal is whether the City exceeded its authority under Nebraska's gap and extend law.[9] Section 18-2001 provides in part:

> Any city or village may, without petition or creating a street improvement district, . . . pave any portion of a street otherwise paved so as to make one continuous paved street, but the portion to be so improved shall not exceed two blocks, including intersections, or thirteen hundred and twenty-five feet, whichever is the lesser. Such city or village may also . . . pave any unpaved street or alley which intersects a paved street for a distance of not to exceed one block on either side of such paved street. The improvements authorized by this section may be performed upon any portion of a street or any unpaved street or alley not previously improved to meet or exceed the minimum standards for pavement set by the city or village for its paved streets.

The City concedes that the first sentence of § 18-2001 did not empower it to make the improvement, but contends that the second sentence provided independent authority to do so. It argues that under the second sentence, it had the authority to create a paving district which extends a street for up to one block from an intersecting paved street. According to the City, "this is the paving of an extension of Donna Street for one block from where it intersects Jean Drive, a paved street."[10]

The trustees argue that a more narrow interpretation of § 18-2001 is warranted and that "[t]he text of the statute, its

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[8] *Iverson, supra* note 3.

[9] See §§ 18-2001 to 18-2005.

[10] Brief for appellant at 10.

legislative history, and the case law interpreting § 18-2001 limit a city's authority under § 18-2001 to instances where a city paves a one or two block unpaved gap between paved streets."[11] The trustees state that "[a]t the very least, an ambiguity exists in the statute as to whether the phrase 'so as to make one continuous paved street' applies to limit both the first and second sentence in § 18-2001, or just the first sentence."[12] We disagree.

[4] First, we determined long ago that the provisions of the gap and extend law are clear and unambiguous.[13] In order for a court to inquire into a statute's legislative history, the statute in question must be open to construction, and a statute is open to construction when its terms require interpretation or may reasonably be considered ambiguous.[14] Because we have determined that provisions of the gap and extend law are clear and unambiguous, they are not open to construction. Thus, we need not inquire into the statute's legislative history.

Second, the ordinary principles governing statutory interpretation lead to the same conclusion in the case before us. Several principles apply, and we discuss each in turn.

[5-7] The plain language of the statute's second sentence clearly applies to the City's extension of Donna Street. The language of a statute is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[15] In other words, absent anything to the contrary, an appellate court will give statutory language its plain and ordinary meaning.[16] And when construing a statute, an appellate court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would

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[11] Brief for appellees at 4.

[12] *Id.* at 6-7.

[13] *Gaughen v. Sloup*, 197 Neb. 762, 250 N.W.2d 915 (1977).

[14] *Bridgeport Ethanol v. Nebraska Dept. of Rev.*, 284 Neb. 291, 818 N.W.2d 600 (2012).

[15] *Robertson v. Jacobs Cattle Co.*, 285 Neb. 859, 830 N.W.2d 191 (2013).

[16] *Hess, supra* note 7.

defeat it.[17] Plainly, the first two sentences of § 18-2001 provide separate but complementary powers to the City. The first sentence provides the power to fill a "gap," that is, an unpaved area between two paved areas. The second sentence, on the other hand, empowers a city to make a single-block extension of paving from an intersecting street. The Legislature used the word "also" to make it clear that the second sentence provided an additional power beyond that granted by the first sentence. Thus, the second sentence provides a very limited power to "extend" paving without a property owner's consent. The complementary powers of the gap and extend law are plainly evident from the words of the statute. Donna Street intersected Jean Drive, a paved street. Thus, the statute allowed the City to pave Donna Street for one block from that intersection. And that is precisely what the City did.

[8,9] The trustees' interpretation would effectively eliminate the second sentence of § 18-2001. It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute.[18] Thus, a court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.[19] The trustees have not identified any additional power that would be conferred by the second sentence under their interpretation. Thus, their interpretation would render the second sentence superfluous or meaningless. For that reason, we must reject their interpretation.

The district court's reliance on *Iverson*, as urged by the trustees, was misplaced. The court's order quotes the following language that can be found in *Iverson*: "It is clear that the Legislature intended that the gap and extend procedure be used only to fill one- or two-block unpaved gaps which exist between paved streets."[20] But the situation presented

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[17] *Id.*

[18] *State v. Medina-Liborio*, 285 Neb. 626, 829 N.W.2d 96 (2013).

[19] *Holdsworth v. Greenwood Farmers Co-op*, 286 Neb. 49, 835 N.W.2d 30 (2013).

[20] *Iverson, supra* note 3, 243 Neb. at 514, 500 N.W.2d at 579.

in *Iverson* was entirely different. There, the municipality, using a "gap-stacking strategy," attempted to circumvent the necessity of creating a paving district, which would require consent of the landowners prior to its initiation.[21] Moreover, the *Iverson* court recognized that two related paving districts, not affected by the *Iverson* decision, had been "created under the provision of § 18-2001 which allows a city to pave any unpaved streets which intersect a paved street for a distance of one block on either side of such paved street."[22] In each instance, one block of an unpaved street perpendicular to an intersecting paved street was paved under the same language of § 18-2001 upon which the City relies. Although the *Iverson* court resorted to legislative history, it did so in the context of an attempt to stack a two-block gap district to further extend a properly enacted one-block gap district. To the extent that *Iverson* speaks to the situation before us, it supports the City's position.

[10,11] The district court correctly recognized that there was no genuine issue of material fact, but because of its erroneous statutory interpretation, the court granted summary judgment to the wrong party. Summary judgment is proper where the facts are uncontroverted and the moving party is entitled to judgment as a matter of law.[23] Both parties moved for summary judgment. The court should have sustained the City's motion but instead sustained the trustees' motion. Although the denial of a motion for summary judgment, standing alone, is not a final, appealable order, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct such further proceedings as

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[21] *Id.*

[22] *Id.* at 512, 500 N.W.2d at 578.

[23] *McLaughlin Freight Lines v. Gentrup*, 281 Neb. 725, 798 N.W.2d 386 (2011).

it deems just.[24] Because there is no issue of fact and the City is entitled to judgment as a matter of law, we determine the controversy accordingly.

CONCLUSION

We conclude that the improvement unit mandating the paving of one block of Donna Street, which intersected Jean Drive, was plainly authorized by the second sentence of § 18-2001. We reverse the judgment of the district court and remand the cause with direction to enter judgment in favor of the City.

REVERSED AND REMANDED WITH DIRECTION.

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[24] *U.S. Bank Nat. Assn. v. Peterson*, 284 Neb. 820, 823 N.W.2d 460 (2012).

JEFF HALL, APPELLEE AND CROSS-APPELLEE, V. COUNTY OF LANCASTER, APPELLANT AND CROSS-APPELLEE, AND NORRIS SCHOOL DISTRICT NO. 160, APPELLEE AND CROSS-APPELLANT.

846 N.W.2d 107

Filed April 18, 2014. No. S-13-724.

1. **Tort Claims Act.** Whether the allegations made by a plaintiff present a claim that is precluded by exemptions set forth in the State Tort Claims Act is a question of law.
2. **Political Subdivisions Tort Claims Act: Tort Claims Act.** The Political Subdivisions Tort Claims Act includes a discretionary function exception similar to that contained in the State Tort Claims Act, and thus, cases construing the State Tort Claims Act exception are equally applicable to the discretionary function exception in the Political Subdivisions Tort Claims Act.
3. **Political Subdivisions Tort Claims Act**: **Appeal and Error.** An appellate court has an obligation to reach its conclusion on whether a claim is precluded by exemptions set forth in the Political Subdivisions Tort Claims Act independent from the conclusion reached by the trial court.
4. **Political Subdivisions Tort Claims Act: Immunity: Waiver.** The Political Subdivisions Tort Claims Act provides limited waivers of sovereign immunity which are subject to statutory exceptions.
5. **Pretrial Procedure: Parties.** A pretrial order is binding upon the parties.
6. **Pretrial Procedure: Pleadings.** The issues set out in a pretrial order supplant those raised in the pleadings.

7. **Immunity: Waiver.** Sovereign immunity is an affirmative defense that can be waived.
8. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought under the Political Subdivisions Tort Claims Act, an appellate court will not disturb the factual findings of the trial court unless they are clearly wrong.
9. **Judgments: Appeal and Error.** When determining the sufficiency of the evidence to sustain the trial court's judgment, it must be considered in the light most favorable to the successful party; every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can be deduced from the evidence.
10. **Negligence: Proof.** In order to recover in a negligence action, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages.
11. **Trial: Negligence: Proximate Cause.** Determination of causation is ordinarily a matter for the trier of fact.
12. **Proximate Cause: Words and Phrases.** A proximate cause is a cause that produces a result in a natural and continuous sequence and without which the result would not have occurred.
13. **Negligence: Proximate Cause: Proof.** To establish proximate cause, the plaintiff must meet three basic requirements: (1) Without the negligent action, the injury would not have occurred, commonly known as the "but for" rule; (2) the injury was a natural and probable result of the negligence; and (3) there was no efficient intervening cause.
14. **Trial: Judgments: Evidence: Appeal and Error.** Where neither party requests that the trial court make specific findings of fact and conclusions of law, if there is a conflict in the evidence, the appellate court in reviewing the judgment rendered will presume that the controverted facts were decided in favor of the successful party, and the findings will not be disturbed unless clearly wrong.
15. **Judgments.** In the absence of a request by a party for specific findings, a trial court is not required to make detailed findings of fact and need only make its findings generally for the prevailing party.
16. **Trial: Negligence: Damages: Appeal and Error.** Because the purpose of comparative negligence is to allow triers of fact to compare relative negligence and to apportion damages on that basis, the determination of apportionment is solely a matter for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by credible evidence and bears a reasonable relationship to the respective elements of negligence proved at trial.
17. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Joe Kelly, Lancaster County Attorney, and Richard C. Grabow for appellant.

Jeanelle R. Lust, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., for appellee Norris School District No. 160.

Terry R. Wittler, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., and Vincent M. Powers, of Vincent M. Powers & Associates, for appellee Jeff Hall.

HEAVICAN, C.J., CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ., and BISHOP, Judge.

CASSEL, J.

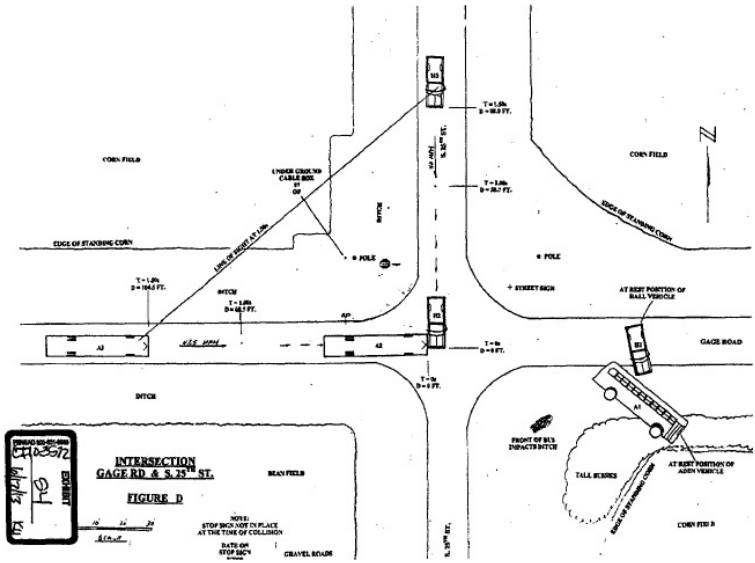
I. INTRODUCTION

A pickup truck and a schoolbus collided at a rural "blind intersection," where a stop sign facing the truck was missing. The district court determined that both drivers were negligent. But the court also found that the county was liable, reasoning that it would have discovered the sign was missing if it had conducted regular sign inspections. Because there was no evidence to support that premise, the court was clearly wrong in determining that the county's lack of a sign-inspection policy was a proximate cause of the accident. We reverse the judgment finding the county liable and remand the cause for a reallocation of liability between the driver of the pickup truck and the school district based upon the existing record.

II. BACKGROUND

1. FACTUAL BACKGROUND

On August 24, 2009, a pickup truck operated by Jeff Hall collided with a bus owned by Norris School District No. 160 (Norris) and operated by Ronny Aden. The collision occurred at the intersection of South 25th Street and Gage Road in Lancaster County, Nebraska. South 25th Street and Gage Road are gravel country roads with a speed limit of 50 miles per hour. Neither vehicle was exceeding the speed limit. Hall was proceeding south on South 25th Street, while the bus was eastbound on Gage Road. The bus was on Hall's right. A diagram from an exhibit in evidence illustrates the intersection and the direction of travel of each vehicle.



The intersection had limited visibility and was "blind" for both drivers. Corn planted near the road obstructed Hall's view to the right and Aden's view to the left. The stop sign for southbound traffic on South 25th Street was missing at the time of the collision. There was no evidence that the County of Lancaster (County) had actual notice of the missing stop sign prior to the accident. Aden, who had driven the same bus route hundreds of times since 2007, had seen a vehicle at the intersection only once or twice a year. He did not believe there was a stop sign at the intersection, but, rather, believed it to be an "open intersection." Hall had not previously traveled on South 25th Street, and he assumed there would be a stop sign for east and west traffic, because he did not have one.

Hall testified that his rate of speed as he approached the intersection was between 45 and 50 miles per hour and that he slowed as he got closer to the intersection because he always slowed as he approached an intersection on a "county road." He estimated his speed to be 40 miles per hour as he entered the intersection. Aden accelerated as he approached the intersection, but the bus did not increase in speed, because it was traveling up an incline. Aden told an investigating officer that

he was driving 47 to 48 miles per hour. Aden testified that a safe speed for the bus going into the blind intersection would have been 20 to 25 miles per hour.

Ted Sokol, Ph.D., an engineer performing accident reconstruction, concluded that there was not enough time for either driver to react once the vehicles became visible to one another. According to Sokol, Hall entered the intersection first, but the vehicles entered at approximately the same time. Sokol opined that Aden should have been more cautious as he approached or entered the intersection and that Aden could have avoided the accident by not assuming traffic on South 25th Street was going to stop and by approaching at a much lower speed so that he could have stopped before entering the intersection. According to Sokol, the bus' maximum speed would have needed to be about 23 miles per hour in order for Aden to perceive and react in time to stop before getting to the west edge of South 25th Street. Sokol testified that Hall could have stopped without entering the intersection if Hall had slowed to 18 miles per hour.

Benjamin Railsback, a mechanical engineer, concluded that the speed of the vehicles was not a contributing factor in the accident. He testified that due to the sight obstruction created by the corn, neither vehicle was visible to the other at a point in time where either driver had the opportunity to perceive and react in order to avoid the accident. He testified that the vehicles would have entered the intersection within a fraction of a second of one another. Railsback did not have any criticism of Aden's driving, because Aden "acted reasonably and drove reasonably through the intersection."

Hall suffered substantial injuries as a result of the accident. Aden and the children who were being transported in the bus also suffered personal injuries. Additionally, Norris incurred property damage.

2. Procedural Background

Hall sued the County and Norris, alleging that the collision was proximately caused by the negligence of the County and of Aden. Hall alleged that Aden was negligent in failing to yield the right-of-way, operating the schoolbus too fast for

the conditions, failing to keep proper control of the bus, and failing to keep a proper lookout. He alleged that the County was negligent in failing to have a traffic control device in place, failing to maintain the stop sign that had been in place, and "failing to take effective practices to ensure that a traffic control device would be in place." Hall further alleged that the County failed to have in place any type of policy or practice to inspect or determine if a stop sign had been removed from an intersection.

The County's responsive pleading alleged that it was immune from suit. The County alleged that Hall was negligent in several respects and that he was negligent in such a degree as to bar recovery or to proportionately diminish the amount sought as damages. The County further alleged that the negligence of Hall and Aden were efficient intervening causes.

Norris filed an answer, counterclaim, and cross-claim. Norris alleged that Hall was contributorily negligent in a degree equal to or greater than the total negligence alleged against Norris and the County. Norris claimed that Hall was negligent by failing to yield the right-of-way to Norris' schoolbus, failing to have his vehicle under proper and reasonable control, operating his vehicle at a speed greater than was reasonable under the conditions, and failing to keep a proper lookout. Norris asserted a counterclaim against Hall, alleging that he proximately caused damage and injuries to Norris by virtue of his negligent acts and omissions. Norris' cross-claim against the County alleged that the County was negligent for failing to discover through reasonable inspection that the stop sign was missing at the intersection and that such negligence was a proximate cause of injuries to Aden, injuries to the children on the bus, and property damage incurred by Norris. Norris sought judgment against both Hall and the County in the amount of $157,847.83.

In the County's amended answer to Norris' cross-claim, the County alleged that it was immune from suit. The County further alleged that it did not have actual or constructive notice of the malfunction, destruction, or removal of the stop sign. The joint pretrial conference order did not expressly identify immunity from suit as a legal issue presented by the case.

3. District Court's Decision

Following a bench trial, the district court entered judgment in Hall's favor. The court stated that "regardless which driver had the right[-]of[-]way, both drivers were negligent for approaching the intersection at a rate of speed that was too fast for the circumstances." The court found that Aden's negligence was greater than that of Hall. As to Norris' claims, the court found that Aden's negligence was 50 percent and denied Norris' claims for recovery.

The district court also found the County to be negligent. The court determined that the County would have discovered the stop sign was missing had it carried out a reasonable inspection and that the absence of a regular inspection, particularly during the high-risk time of year when crops are mature in late summer and early fall, was not reasonable. The court concluded that Aden's and Hall's conduct was foreseeable. Ultimately, the court found the County liable, stating that "[h]ad the stop sign been in placed [sic] it would have been clearly visible to Hall so that he could have stopped at the intersection and avoided the collision."

The court explicitly determined that the negligence of Norris was 50 percent and that Hall's percentage of negligence was 30 percent. The court also stated that the combined negligence of Norris and the County was 70 percent. Thus, as the County and Hall acknowledge, the court implicitly allocated the County's negligence as 20 percent. The court entered judgment against Norris and the County, jointly and severally, in the amount of $770,000. Additional findings of the district court will be included in the analysis.

The County timely appealed, and Norris filed a cross-appeal. We moved the case to our docket under our statutory authority to regulate the caseloads of the appellate courts of this state.[1]

III. ASSIGNMENTS OF ERROR

The County assigns that the district court erred in failing to determine that the County maintained its sovereign immunity

[1] Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

for discretionary policy decisions made in relation to sign inspections and related documentation.

The County and Norris each assign error regarding the district court's ultimate determinations of negligence. The County contends that the court erred in determining that the County's sign-inspection policies and documentation were so inadequate as to give the County constructive notice of a missing stop sign, in determining that the County's failure to adopt an adequate sign policy was a proximate cause of Hall's damages, and in failing to determine that the acts of Hall and Aden were efficient intervening causes for the claims of Norris and Hall against the County so that any negligence against the County could not be considered the proximate cause of Hall's or Norris' damages. Norris assigns that the court erred in not determining that Hall was more than 50 percent at fault as a result of the court's failure to make findings on violations of the Nebraska Rules of the Road.[2]

Norris also assigns that the district court erred in failing to allocate Hall's damages into economic and noneconomic damages and failing to allocate percentages of fault to Norris and the County on Hall's claims.

IV. ANALYSIS

1. Sovereign Immunity

(a) Issue

The County argues that it maintained sovereign immunity for decisions made regarding the adoption and implementation of a sign-inspection policy. But Hall counters that the discretionary function exception was not an issue at trial.

(b) Standard of Review

[1-3] Whether the allegations made by a plaintiff present a claim that is precluded by exemptions set forth in the State Tort Claims Act is a question of law.[3] The Political Subdivisions

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[2] See Neb. Rev. Stat. §§ 60-601 to 60-6,381 (Reissue 2010, Cum. Supp. 2012 & Supp. 2013).

[3] See *Fickle v. State*, 273 Neb. 990, 735 N.W.2d 754 (2007), *modified on other grounds* 274 Neb. 267, 759 N.W.2d 113.

Tort Claims Act includes a discretionary function exception similar to that contained in the State Tort Claims Act, and thus, cases construing the State Tort Claims Act exception are equally applicable to the discretionary function exception in the Political Subdivisions Tort Claims Act.[4] An appellate court has an obligation to reach its conclusion on whether a claim is precluded by exemptions set forth in the Political Subdivisions Tort Claims Act independent from the conclusion reached by the trial court.[5]

(c) Additional District Court Findings

The district court did not specifically reference Neb. Rev. Stat. § 13-910 (Reissue 2007) or make any findings regarding sovereign immunity or the discretionary function exception.

(d) Discussion

[4] The Political Subdivisions Tort Claims Act provides limited waivers of sovereign immunity which are subject to statutory exceptions.[6] If a statutory exception applies, the claim is barred by sovereign immunity.[7] The County argues that the district court erred in implicitly determining that § 13-910(2) did not apply to Hall's theory that the County had constructive notice of the missing stop sign by virtue of not adopting an adequate sign-inspection policy. The County relies on the statute stating that the Political Subdivisions Tort Claims Act shall not apply to "[a]ny claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of the political subdivision or an employee of the political subdivision, whether or not the discretion is abused."[8]

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[4] See *Shipley v. Department of Roads*, 283 Neb. 832, 813 N.W.2d 455 (2012).

[5] See *Fickle*, *supra* note 3.

[6] *Shipley*, *supra* note 4.

[7] *Id.*

[8] § 13-910(2).

The County's responsive pleadings claimed immunity. The County asserted that it was entitled to immunity because Hall's and Norris' claims were based on the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a political subdivision or an employee of the political subdivision.[9] The County further alleged that it was immune from suit, because the claim alleged by Norris arose out of the malfunction, destruction, or unauthorized removal of any traffic or road sign, signal, or warning device, and that the County did not have actual or constructive notice of such malfunction, destruction, or removal.[10]

Hall claims that the County waived the issue of immunity. He points out that the joint pretrial conference order listed only three legal issues for trial: Norris' negligence, the County's negligence, and Hall's negligence. Indeed, the pretrial order did not identify sovereign immunity or the discretionary function exception as an issue for trial. The district court did not explicitly address immunity in its judgment. But the pretrial order framed the claim against the County as including the "fail[ure] to discover through reasonable inspection that the stop sign was missing at the intersection where the collision occurred." This framed the issue in light of the provision of § 13-910(9) regarding actual or constructive notice of a missing sign.

[5,6] The pretrial order is binding upon the parties.[11] And the issues set out in a pretrial order supplant those raised in the pleadings.[12] The joint pretrial conference order in this case did not identify immunity as an issue, and it specifically ordered that "trial of this case will be governed by the terms of this pretrial conference order and the terms hereof supersede all prior pleadings in this case." This court has affirmed the limiting of the issues at trial to those specified in the pretrial

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[9] See *id.*

[10] See § 13-910(9).

[11] *Olson v. England*, 206 Neb. 256, 292 N.W.2d 48 (1980).

[12] *Cotton v. Ostroski*, 250 Neb. 911, 554 N.W.2d 130 (1996).

order and limiting the admission of evidence to the issues thus established on numerous occasions.[13]

[7] Further, sovereign immunity is an affirmative defense that can be waived. The exceptions set forth in § 13-910 are affirmative sovereign immunity defenses to claims brought pursuant to the Political Subdivisions Tort Claims Act.[14] We have interpreted exceptions to the State's waiver of immunity under both the State Tort Claims Act and the Political Subdivisions Tort Claims Act as affirmative defenses that the State must plead and prove.[15] In *Reimers-Hild v. State*,[16] the defendants did not raise sovereign immunity as an affirmative defense in their answer and the court's pretrial order specified that the sole issue at trial was whether the plaintiff's claim was timely filed. On appeal, the defendants argued that the action against the State was barred by sovereign immunity. We recognized that sovereign immunity implicated a jurisdictional issue that may be raised at any time by any party, but we declined to consider it because it was not raised in the trial court. We noted that the record was created by stipulation, that the parties apparently did not contemplate the sovereign immunity issue at that time, and that we did not know what arguments might have been made or evidence adduced had the State raised a sovereign immunity defense in the district court.

(e) Resolution

By failing to identify sovereign immunity as an issue for trial in the joint pretrial conference order, we conclude that the County waived its claim that it was entitled to immunity under the discretionary function exception contained in § 13-910(2).

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[13] See *Cockrell v. Garton*, 244 Neb. 359, 507 N.W.2d 38 (1993) (collecting cases).

[14] *Doe v. Omaha Pub. Sch. Dist.*, 273 Neb. 79, 727 N.W.2d 447 (2007).

[15] *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010).

[16] *Reimers-Hild v. State*, 274 Neb. 438, 741 N.W.2d 155 (2007).

2. Negligence of County

(a) Issue

The County argues that the district court erred in determining that it was liable because it did not have an adequate sign-inspection policy. Evidence established that the County did not have a written policy or a set schedule for conducting sign inspections. The court determined that the County's sign-inspection procedures were so inadequate as to give the County constructive notice of the missing sign. The County argues that the court erred in determining that the County's sign-inspection procedures were a proximate cause of Hall's damages.

(b) Standard of Review

[8,9] In actions brought under the Political Subdivisions Tort Claims Act, an appellate court will not disturb the factual findings of the trial court unless they are clearly wrong.[17] When determining the sufficiency of the evidence to sustain the trial court's judgment, it must be considered in the light most favorable to the successful party; every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can be deduced from the evidence.[18]

(c) Additional Evidence at Trial

The Lancaster County engineering department maintained over 800 miles of arterial roads in the county. Employees of the engineering department were trained to look for damaged or "down" signs while performing their work duties. As one employee testified, "[P]atrol operators . . . out running the roads . . . are [the County's] first line of defense." The sheriff's office also notified the County of signs that were missing. If a stop sign was missing, the County tried to replace it as soon as possible.

Troy Foster, a laborer for the Lancaster County engineering department, mows ditches along the county roads. Foster

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[17] *Blaser v. County of Madison*, 285 Neb. 290, 826 N.W.2d 554 (2013).

[18] *Ginapp v. City of Bellevue*, 282 Neb. 1027, 809 N.W.2d 487 (2012).

makes it to each "spot" in his area about twice a year, and he mows each area once a year. Foster testified that when he first began mowing, the district supervisor for the southeast area of Lancaster County told him to look for damaged or "down" signs while performing his job and to call the supervisor if such a sign was found. Foster testified that during times of inclement weather or when he was not otherwise mowing, his duty would be "to go around and look for signs that are down, leaning, any kind of repairs that need to be done." He testified that signs are inspected "during our daily business or, you know, as we are going from place to place, we check signs then." There was no pattern that he would follow, and he would not know if a fellow employee had gone to the same place. Foster did not make any record of where he had been to look for signs. Foster testified that he was not given a map or chart showing the location of signs within the county, but he also testified that at one time, employees were given maps showing "by the sections" where signs should be.

Employees of the Lancaster County engineering department testified regarding their most recent work at the intersection prior to the August 24, 2009, accident. Foster had last mowed near the intersection on June 24, and he testified that the stop sign was present at that time. Rick DeBoer, who performs general road maintenance for the County in the spring and summer months, graded South 25th Street to Gage Road and beyond on August 17. He testified that he automatically checks for signs while grading, that he would have done so on that day, and that he did not remember the stop sign being down. If it had been down, DeBoer would have immediately called it in or fixed it.

An employee with the Lancaster County engineering department maintains a computer database of all the signs owned by Lancaster County which includes when the signs have been replaced. The database also tracks why a sign is replaced, including, for example, routine maintenance, installation of a new sign, or the sign was stolen or vandalized. Each sign is replaced every 10 years. Every year, an employee runs a query through the database which results in a list of signs to be replaced that year.

(d) Additional District Court Findings

The district court found the County to be negligent. The court stated that the County did not take reasonable steps to ensure that the stop sign was in place and that a collision at the intersection was foreseeable in the absence of a stop sign. The court observed that there was no policy in place for routine or more frequent inspections during the months that the intersection was rendered "blind" by mature corn. The court noted that no records of traffic control device inspections were kept by employees who routinely worked in the area, even though employees kept records of what areas were mowed and what roads were maintained, and that there was no record of the route taken or observations made during inclement-weather inspections.

The district court found that the County would have discovered the stop sign was missing had it carried out a reasonable inspection and that the absence of a regular inspection, particularly during the high-risk time of year, was not reasonable. The court further found that "the inspections which were conducted were not designed to assure a reasonable inspection of the traffic control devices of the county. They were only conducted haphazardly, in inclement weather, without a map of where devices were located and without a search pattern that assured complete inspection."

The district court considered the foreseeable nature of Aden's and Hall's conduct. The court stated that it was foreseeable that drivers on Gage Road and South 25th Street would not slow to the extremely slow speeds necessary to avoid a collision and that it was foreseeable that the risk of collision rises significantly at the time of the year the collision occurred. The court found the County liable, stating that Hall could have stopped at the intersection and avoided the collision if the stop sign had been in place.

(e) Discussion

The district court correctly recognized that the claim against the County based upon the missing stop sign was premised

upon the County's failure to discover the absence of the sign "within a reasonable time after actual or constructive notice"[19] to the County. The court also correctly recognized that there was no evidence of actual notice to the County. But the court reasoned that constructive notice could be found in the absence of a sign-inspection policy. We disagree.

[10] In order to recover in a negligence action, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages.[20] For purposes of this opinion, we will assume, without deciding, that the County breached a duty by failing to have a sign-inspection policy. Once the County elected to erect a stop sign, it was required to maintain it in conformance with the Manual on Uniform Traffic Control Devices (Manual).[21] With regard to maintenance of traffic signs, the Manual provides in part:

> To assure adequate maintenance, a schedule for inspecting (both day and night), cleaning, and replacing signs should be established. Employees of highway, law enforcement, and other public agencies whose duties require that they travel on the roadways should be encouraged to report any damaged, deteriorated, or obscured signs at the first opportunity.

The above provision is labeled as a "[g]uidance," which the Manual defines as "a statement of recommended, but not mandatory, practice in typical situations, with deviations allowed if engineering judgment or engineering study indicates the deviation to be appropriate." Notably, the Manual does not prescribe a frequency for the inspection of signs.

[11-13] Determination of causation is ordinarily a matter for the trier of fact.[22] By finding the County liable, the district court determined that it was a proximate cause of the damages. A proximate cause is a cause that produces a result in a natural and continuous sequence and without which the result

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[19] See § 13-910(9).

[20] *Blaser, supra* note 17.

[21] See § 60-6,121.

[22] *Brandon v. County of Richardson*, 261 Neb. 636, 624 N.W.2d 604 (2001).

would not have occurred.[23] To establish proximate cause, the plaintiff must meet three basic requirements: (1) Without the negligent action, the injury would not have occurred, commonly known as the "but for" rule; (2) the injury was a natural and probable result of the negligence; and (3) there was no efficient intervening cause.[24]

In actions brought pursuant to the Political Subdivisions Tort Claims Act, this court has, on occasion, reversed the judgment of the district court with respect to causation despite the generally deferential standard of review. In *Brandon v. County of Richardson*,[25] the trial court found the victim to be contributorily negligent, but we reversed that finding and stated that the record failed to show that the victim's conduct was a proximate cause. We reasoned, in part, that "[t]he record does not show that had [the victim] kept law enforcement accurately informed of her whereabouts or returned for the second interview . . . the result would have been different."[26] And in *Koncaba v. Scotts Bluff County*,[27] we reversed a trial court's judgment in the plaintiff's favor after determining that the record established, as a matter of law, that the plaintiff's decedent was contributorily negligent and that such negligence was a proximate cause of the accident.

On this record, no reasonable fact finder could conclude that the County's failure to have a sign-inspection policy was a proximate cause of the accident. Hall and Norris had the burden to show that if the County had established a proper procedure for inspecting its signs, it would have discovered the missing stop sign and replaced it before the accident occurred. But there is no evidence to establish how long the stop sign was missing or how frequently sign inspections should be conducted under the circumstances. Thus, Hall and Norris cannot establish that the sign was missing long enough that it would

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[23] *Stacy v. Great Lakes Agri Mktg.*, 276 Neb. 236, 753 N.W.2d 785 (2008).

[24] *Radiology Servs. v. Hall*, 279 Neb. 553, 780 N.W.2d 17 (2010).

[25] *Brandon*, *supra* note 22.

[26] *Id.* at 667-68, 624 N.W.2d at 627.

[27] *Koncaba v. Scotts Bluff County*, 237 Neb. 37, 464 N.W.2d 764 (1991).

have been discovered pursuant to a sign-inspection procedure. And because the Manual does not mandate any frequency of inspection, liability in this case cannot be fairly attributed to the County's lack of a formal policy for sign inspections. As a matter of law, the record fails to show that the County's failure to have a sign-inspection policy was a proximate cause of the accident.

(f) Resolution

Because there was no evidence to establish that the County's failure to have a sign-inspection policy was a proximate cause of the accident, we reverse the judgment of the district court finding the County liable and apportioning fault to it. We remand the cause to the district court to apportion the County's share of negligence between Hall and Norris.[28]

3. Hall's Negligence

(a) Issue

Norris argues that by failing to determine who had the right-of-way at the intersection, the court failed to give proper consideration as to whether Hall's contributory negligence should bar his recovery as a matter of law.

(b) Standard of Review

In actions brought under the Political Subdivisions Tort Claims Act, an appellate court will not disturb the factual findings of the trial court unless they are clearly wrong.[29]

[14] Where neither party requests that the trial court make specific findings of fact and conclusions of law, if there is a conflict in the evidence, the appellate court in reviewing the judgment rendered will presume that the controverted facts were decided in favor of the successful party, and the findings will not be disturbed unless clearly wrong.[30]

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[28] See *Downey v. Western Comm. College Area*, 282 Neb. 970, 808 N.W.2d 839 (2012).

[29] *Blaser, supra* note 17.

[30] *C. Goodrich, Inc. v. Thies*, 14 Neb. App. 170, 705 N.W.2d 451 (2005).

(c) Additional District Court Findings

The court found that "regardless which driver had the right[-]of[-]way, both drivers were negligent for approaching the intersection at a rate of speed that was too fast for the circumstances." The court further found that Aden's negligence was greater than that of Hall because Aden was familiar with the intersection, knew the intersection was completely blind, and believed traffic from the north was not required to stop, but entered the intersection at the maximum permissible speed.

(d) Discussion

Norris claims that the district court erred by failing to make a finding regarding whether Hall or Aden had the right-of-way. Norris argues that because the vehicles arrived at the intersection at approximately the same time, Aden had the right-of-way. Hall argues that the statutory right-of-way is only one factor to be used in evaluating a person's conduct and that he complied with the applicable standard of care. He directs us to *Hodgson v. Gladem*,[31] where we stated:

> The statutory right-of-way rule, if it is to be effective, must be accompanied by an observance by both parties of the rules applicable to the exercise of due care and in particular the duty to keep a lookout and make effective observations at a time when such observations can have an effect consonant with [the] underlying purpose of the rules.

[15] The district court was not required to make a specific factual finding regarding the statutory right-of-way. In the absence of a request by a party for specific findings, a trial court is not required to make detailed findings of fact and need only make its findings generally for the prevailing party.[32] Neither Norris nor any other party requested specific findings by the district court. Accordingly, the court was not obligated

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[31] *Hodgson v. Gladem*, 187 Neb. 736, 741, 193 N.W.2d 779, 782 (1972).

[32] *Lesser v. Eagle Hills Homeowners' Assn.*, 20 Neb. App. 423, 824 N.W.2d 77 (2012). See Neb. Rev. Stat. § 25-1127 (Reissue 2008).

to make a specific determination regarding which driver had the right-of-way.

(e) Resolution

Because no party requested specific findings of fact by the district court, we presume that any issue regarding the statutory right-of-way rule was decided in Hall's favor. But because we remand for reallocation of the 20 percent of fault initially allocated to the County, we do not know whether the fault allocated to Norris will be equal to or greater than that allocated to Hall.

4. Allocation of Damages and Fault

(a) Issue

Norris argues that the district court erred by failing to allocate damages into economic and noneconomic damages and by failing to allocate percentages of fault between Norris and the County.

(b) Standard of Review

[16] Because the purpose of comparative negligence is to allow triers of fact to compare relative negligence and to apportion damages on that basis, the determination of apportionment is solely a matter for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by credible evidence and bears a reasonable relationship to the respective elements of negligence proved at trial.[33]

(c) Additional District Court Findings

The district court awarded Hall $1,100,000 and identified Hall's medical expenses as totaling $357,335.86. The court found the percentage of negligence of Norris and the County to be 70 percent and the percentage of negligence of Hall to be 30 percent. After reducing the total damages by the 30 percent which represented Hall's contributory negligence, the court entered judgment of $770,000 in Hall's favor.

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[33] *Connelly v. City of Omaha*, 284 Neb. 131, 816 N.W.2d 742 (2012).

(d) Discussion

Norris' argument is based on Neb. Rev. Stat. § 25-21,185.10 (Reissue 2008), which concerns the allocation of liability in actions involving more than one defendant. Norris asserts that the statute requires the district court to make specific rulings on economic and noneconomic damages and requires a separate judgment against each defendant for that defendant's percentage of the noneconomic damages based on that defendant's percentage of fault.

Our reversal of the judgment against the County undermines Norris' argument. Because we have determined that the County is not liable for Hall's injuries, the allocation between Norris and the County is no longer an issue.

But there is an issue of allocation remaining, which we cannot resolve in this appeal. The district court allocated 50 percent of the negligence to Norris, 30 percent to Hall, and 20 percent to the County. Because we have determined that the County was not liable for Hall's damages, the 20 percent of negligence allocated to it must be reallocated. But because apportionment is solely a matter for the fact finder and will be upheld except in very limited circumstances, we cannot determine how the district court would have allocated the 20 percent as between Hall and Norris.[34] We must remand the cause in order for the district court to make this allocation in the first instance.

(e) Resolution

Because we have determined that the County is not liable for Hall's damages, the matter of allocation of damages between the County and Norris is no longer an issue. But remand is necessary to apportion the County's share of the negligence as between Hall and Norris. We remand the cause to the district court for a reallocation of liability between Hall and Norris based upon the existing record.

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[34] See *Downey, supra* note 28.

5. Remaining Assignments of Error

[17] Our resolution of this appeal makes it unnecessary to consider the other assignments of error. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[35]

V. CONCLUSION

We conclude that the County waived its claim that it was entitled to immunity under the discretionary function exception, because it failed to identify sovereign immunity as an issue for trial in the pretrial order. We reverse the judgment of the district court finding the County liable, because there is no evidence to establish that the County's failure to have a sign-inspection policy was a proximate cause of the accident. Because the County is not liable, the matter of allocation of damages between it and Norris is no longer an issue. But as to the 20 percent of liability erroneously assessed to the County, we cannot determine how the finder of fact would have allocated such negligence between Hall and Norris. We remand the cause to the district court for a reallocation, between Hall and Norris based upon the existing record, of the 20 percent of liability initially allocated to the County.

Affirmed in part, and in part reversed and remanded for further proceedings.

Wright, J., not participating.

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[35] *Kerford Limestone Co. v. Nebraska Dept. of Rev.*, *ante* p. 653, 844 N.W.2d 276 (2014).

JOHN DOE, APPELLANT, V. BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA ET AL., APPELLEES.

846 N.W.2d 126

Filed April 24, 2014. No. S-12-1136.

1. **Summary Judgment.** Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Federal Acts: Discrimination: Claims.** Because the Americans with Disabilities Act of 1990 sets forth the same remedies, procedures, and rights as the Rehabilitation Act of 1973, claims brought under both acts are analyzed together.
4. **Federal Acts: Discrimination: Public Officers and Employees: Immunity.** Government officials cannot be sued in their individual capacities under either title II of the Americans with Disabilities Act of 1990 or the Rehabilitation Act of 1973.
5. **Summary Judgment: Proof.** A party makes a prima facie case that it is entitled to summary judgment by offering sufficient evidence that, assuming the evidence went uncontested at trial, would entitle the party to a favorable verdict.
6. **Summary Judgment: Evidence: Proof.** After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.
7. **Federal Acts: Discrimination: Proof.** The burden of proving discrimination under the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973 remains always with the plaintiff.
8. ____: ____: ____. The burden of production in an action under the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973 shifts between the parties under the framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).
9. ____: ____: ____. A student bringing action under the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973 for discrimination by an educational institution and its officers in their official capacities must first make out a prima facie case by proving (1) that he or she was disabled within the meaning of the acts; (2) that he or she otherwise was able, with or without accommodations, to meet the academic and technical standards requisite to admission and participation in the school's education program; and (3) that he or she suffered an adverse action because of his or her disability.
10. ____: ____: ____. Once a prima facie case of discrimination is made under the Americans with Disabilities Act of 1990 or the Rehabilitation Act of 1973, the

burden shifts to the defendants to articulate a legitimate, nondiscriminatory reason for the adverse action. Upon such articulation by the defendants, the burden shifts back to the plaintiff to produce evidence that the stated nondiscriminatory reason is a pretext for discrimination.

11. **Federal Acts: Discrimination.** If the defendant did not know of the plaintiff's disability, then the defendant cannot be liable under the Americans with Disabilities Act of 1990 or the Rehabilitation Act of 1973.
12. **Discrimination: Mental Health.** Mental disabilities are rarely open, obvious, and apparent.
13. **Federal Acts: Discrimination.** Under the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973, adverse actions because of discrimination include failing to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability.
14. **Discrimination: Proof.** The plaintiff claiming discrimination based on a failure to accommodate must identify a specific reasonable accommodation or accommodations that would allow the plaintiff to perform under the program at issue.
15. **Discrimination: Liability.** When a program provides reasonable designated channels through which participants must notify the program of a disability and the requested accommodations, then the program is not liable for a failure to accommodate unless the plaintiff utilizes those channels.
16. **Discrimination.** The element of adverse action may be something short of termination or dismissal from a program, but there must be materially adverse consequences affecting the terms, conditions, or privileges under the program, such that a reasonable trier of fact could find objectively tangible harm.
17. ____. Adverse action may be properly based on conduct even where that conduct is related to the disability.
18. **Federal Acts: Discrimination.** In actions under the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973, substantial deference is generally given to academic judgments.
19. **Colleges and Universities: Courts.** Courts are generally ill equipped, as compared with experienced educators, to determine whether a student meets a university's reasonable standards for academic and professional achievement.
20. ____: ____. Evaluating performance in clinical courses is no less an academic judgment than that of any other course, and is entitled to the same deference.
21. **Discrimination: Proof.** A reason cannot be proved to be a pretext for discrimination unless it is shown both that the reason was false and that discrimination was the real reason.
22. **Colleges and Universities: Courts.** The deference extended to academic decisions extends also to the procedural requirements surrounding those decisions.

Appeal from the District Court for Douglas County: SHELLY R. STRATMAN, Judge. Affirmed.

John Doe, pro se.

Amy L. Longo and Lawrence K. Sheehan, of Ellick, Jones, Buelt, Blazek & Longo, L.L.P., for appellees.

HEAVICAN, C.J., CONNOLLY, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

MCCORMACK, J.

I. NATURE OF CASE

The plaintiff, known as John Doe, brought suit under title II of the Americans with Disabilities Act of 1990 (ADA)[1] and § 504 of the Rehabilitation Act of 1973 (Rehabilitation Act)[2] against the defendants. Doe, representing himself pro se, alleged that the University of Nebraska Medical Center (UNMC), the Board of Regents of the University of Nebraska, and several members of UNMC's staff, in their official and individual capacities, discriminated against him while he was a medical student at UNMC, because of his chronic and recurrent depressive disorder disability. The district court dismissed the staff in their individual capacities and granted summary judgment in favor of the remaining defendants. Doe appeals.

II. BACKGROUND

1. PLACED "ON REVIEW" FOR POOR PERFORMANCE FRESHMAN YEAR AT UNMC

Doe started medical school in August 2003. He was placed "On Review" shortly thereafter for weak performance in structure and development of the human body core. According to the Scholastic Evaluation Committee (SEC) guidelines, a student is placed "On Review" when the student's performance is marginal during the course of the academic year. This may include, but not be limited to, performance on a single examination (exam) or performance in a core or clerkship. Doe was again informed that he was "On Review" at the end of the first semester of his first year, for receiving a grade of "Marginal" in structure and development of the human body core.

In letters informing Doe of his "On Review" status, Doe was referred to various support services of the academic success

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[1] 42 U.S.C. § 12131 et seq. (2006).

[2] 29 U.S.C. § 797(a) (2006).

program and of student counseling, as well as a tutoring program through the office of admissions and students. He was also encouraged to speak with Dr. Jeffrey W. Hill, the associate dean for admissions and students.

2. Rescheduled Exam After Fiance Troubles

At the end of his freshman year of medical school, Doe asked to reschedule his comprehensive first-year exam. Doe's wedding had been scheduled to take place around that time. Doe asked to delay the comprehensive exam, because he decided to postpone the wedding. Doe met with Hill and explained that he was having "apprehensions about getting married," which were causing Doe "stress." Doe explained to Hill that his fiance would not wait until after the exam to work on issues they were having in their relationship and that this was "very difficult, stressful, and draining to me both emotionally and physically." That difficulty was combined with Doe's "anticipatory stress" of his decision to tell his fiance he wanted to postpone the wedding—after her parents had already spent "a lot of money" on the event. Doe thought this "taxing" situation would "affect [his] performance on the comprehensive exam." Doe was allowed to postpone the exam, which he later passed.

3. More Exams Rescheduled Sophomore Year

The comprehensive first-year exam was the first of several exams that Doe postponed until a later date. Dr. Gerald Moore, the senior associate dean for academic affairs, stated that he met with Doe on two or three occasions during Doe's first 2 years of medical school "because of his frequent delay of exams."

According to Moore, when he asked Doe whether he was experiencing any problems, Doe stated only that he was having problems with his girlfriend. Doe never told Moore he had a disability. Doe claimed that when he postponed an exam twice in October 2004, he told Moore he was "depressed" and having trouble sleeping and concentrating.

Doe went to see a psychiatrist, whom Doe saw only once. Doe obtained prescriptions for antianxiety and antidepressant medications. The psychiatrist diagnosed Doe with adjustment disorder with depressed mood, but Doe did not convey this diagnosis to UNMC.

By December 16, 2004, Moore informed Doe that his rescheduling of exams "was not professional behavior for a future physician" and that he would not be allowed to delay future exams.

Around that time, Doe's ex-fiance began dating someone else, which caused Doe further distress. In January 2005, Doe's grandmother died.

4. Diagnosed With Major Depressive Disorder

In January 2005, Doe saw a different psychiatrist, Dr. Rafael Tatay, who diagnosed Doe with chronic and recurrent major depressive disorder. Tatay recommended that Doe engage in psychotherapy and prescribed antidepressants and antianxiety medications. Tatay explained that other than Doe vaguely mentioning in their first meeting that he could not concentrate, "[m]edical school was not an issue" for Doe: "[T]he main issue of this person was with the interpersonal relationships, with depression." Tatay saw Doe in January, May, and August 2005. After that, Tatay did not see Doe until 2007.

Doe also spoke occasionally with Dr. David Carver, who is a psychologist and the director of the counseling and student development center at UNMC. Carver averred that he met with Doe in May 2004, April 2005, and September 2006. In these meetings, Doe discussed the breakup with his fiance and his academic performance. At one meeting, Doe mentioned to Carver that he saw a psychiatrist and a doctor over the course of the breakup with his fiance and the death of his grandmother. Carver averred that he was never aware, however, that Doe had been given a psychiatric diagnosis of major depression. Doe testified he thought he had told Carver about "being depressed."

5. Doe Did Not Claim Disability at Office of Services for Students With Disabilities

Determinations at UNMC of whether a student has a disability and what accommodations may be required are made by the office of services for students with disabilities, a subdivision of the counseling and student development center at UNMC. The center informs incoming medical students about these services during orientation, and this information is also included in the student handbook and on the UNMC Web site.

The policies of the office of services for students with disabilities are posted on its Web site, in the student handbook, and in the flyer in the orientation materials provided to all incoming enrolled students. The policies state that in order to be eligible for academic or physical accommodations, a student must contact the student counseling center and fill out an application for disability accommodation well in advance of the time for which the accommodation is needed. Underlined and in boldface, the policies state that faculty will not be expected to provide accommodation without a letter from the student counseling center verifying eligibility for accommodations and setting forth an accommodation plan.

It is undisputed that during his enrollment at UNMC, Doe never contacted the office of services for students with disabilities and never requested accommodations through the procedures set forth by that office.

Doe explained that while he was in medical school, he did not think of his major depressive disorder as a "disability" and did not consider himself "disabled." When, after this lawsuit was filed, Doe was asked what type of accommodations he requires because of his disability, Doe stated that that would depend on the time and the situation.

6. Doe Granted Leave of Absence for Wedding-Related Issues

On January 21, 2005, Doe requested a leave of absence from the medical school. Doe requested permission to postpone his neurology/ophthalmology/psychiatry core to the summer before his junior year. Doe explained that he had been "trying

to find resolution" with canceling his wedding and that his grandmother had recently passed away.

The SEC granted Doe a leave of absence. The original letter granting leave stated it would be from January 21 to February 6, 2005, but it appears that the leave lasted the entirety of Doe's second semester. The SEC guidelines provide for a leave of absence "under exceptional circumstances," "for academic, medical, and personal reasons." Under the guidelines, a student will be required to return from a leave of absence no later than the beginning of the next academic year.

In the letter communicating the leave of absence to Doe, Hill informed Doe that he could postpone the neurology/ophthalmology/psychiatry core, but would not be allowed to postpone any other exams for the remainder of the academic year. Hill stated in the letter that Doe had postponed exams several times in the previous semester and that "this cannot be tolerated in the future." Doe later asserted that these statements "suggested to me that I would no longer be accommodated for my depression/disability when I returned [from] my [leave of absence]."

Hill stated that the SEC did not grant the requested leave of absence because of alleged major depressive disorder or any other alleged disability. In fact, Hill averred that at no point in his interactions with Doe did Doe inform him that he had major depressive disorder or any other disability.

Doe testified in his deposition that he talked to Hill about "being depressed." Doe had stated in a prior affidavit that he told Hill of his diagnosis of major depressive disorder and told Hill that he was taking medications.

Doe testified that he met with the SEC during his leave of absence and that it "seem[ed] like [his depression] did come up." But Doe could not ultimately remember what was or was not said.

7. Doe Completed Sophomore Year With Specially Arranged Summer Core

The SEC determined, after much discussion, to grant Doe's request to take the neurology/ophthalmology/psychiatry core

in the summer before the start of his junior year. Hill explained that, typically, a student taking a leave of absence would have to come back and repeat the missed core at the same time the following year. A student cannot take the required "USMLE Step 1" exam until that missed core has been completed, however, and, under the SEC guidelines, the USMLE Step 1 exam must be taken before entering the junior-year clerkships. According to Hill, the physician who taught the core agreed to teach it to Doe over the summer, "so we could kind of keep him with his class and keep things moving along and so he didn't have to wait a whole year to take that core." Hill said that such a special summer arrangement was something UNMC had never done before, that it was inconvenient for the teaching physician, and that it was something that UNMC was not going to do again. Doe thus successfully completed his sophomore year the summer following his leave of absence.

8. Doe Signed Junior-Year Professionalism Statement

Before entering his junior year, Doe, as required of all medical students before entering their junior year, signed a "Professionalism Statement." The Professionalism Statement explained that any deviations of professional behavior are noted by attendings and lecturers, during class or in a clinical setting, and that faculty are required to report such deviations to the associate dean for admissions and students. In addition, the statement explained that unprofessional behavior will put the student at risk of failing clerkships or having the grade lowered.

9. During Junior Year Doe Failed Two Clerkships and Received Marginal in One Clerkship

During his junior year, Doe had pediatrics, internal medicine, obstetrics and gynecology (Ob/Gyn), family medicine, and psychiatry clerkships. He received grades of pass or better in his psychiatry and family medicine clerkships. But Doe received a grade of fail in both his internal medicine and his

Ob/Gyn clerkships. He received a grade of marginal in his pediatrics clerkship.

(a) Ob/Gyn Clerkship

Dr. Sonja R. Kinney, director of the Ob/Gyn clerkship, sent Doe an e-mail on January 25, 2006, advising him of unprofessional conduct observed by faculty and resident physicians, in the hopes that he could improve his clinical performance. That e-mail stated that "[r]esidents noted your playing internet poker on labor and delivery, attendings noted leaving during clinic time to get concert tickets, and staff noted your absence this morning at teaching conferences." Kinney stated that Doe's performance did not improve following his receipt of this e-mail.

Doe received a scaled percentile score of 64 on the Ob/Gyn "shelf" exam, which was the 12th percentile for his class. Anything less than 10th percentile is considered failure of the shelf exam, so this was considered a pass. But students receive a grade of fail for the clerkship if they do not meet minimum criteria for the clinical component of the grade, regardless of the shelf exam score. Doe received a fail for his clinical component.

The comments on his grade sheet stated that Doe "was notably absent from or late to required activities and frequently did not complete tasks as assigned." He had difficulty presenting patients and fielding questions, and he had a below-average knowledge base. The comments further stated that after being notified of professionalism issues, Doe continued to have incidents, including weak performance during service, failing to show up for a session without excuse or explanation, sometimes being abrupt with patients, and having a knowledge base that was "'greatly lacking.'" The comments stated that Doe was frequently absent or late to clinical rounds and didactic teaching sessions, left a clinic early to pick up concert tickets without explanation, played games on his computer during downtime on labor and delivery, did not go home and change when asked to do so because of casual attire, and generally "'gave impression that he did not seem interested in seeing patients or learning from faculty.'" The comments further

stated, "Overall he showed a pattern of lack of concern for his professional role . . . ."

After receiving his grade, Doe discussed it with Kinney. Doe generally denied that most of the events referred to in the grade sheet or the previous e-mail referred to him—he asserted he had been confused with a different student. Doe admitted, however, that he had left the clinic room to get concert tickets in the midst of taking a patient history. Doe explained, "'[W]ell you know, I have a life outside the hospital.'"

Kinney averred that throughout the course of monitoring Doe's clinical performance on the Ob/Gyn clinical service, she "treated John Doe in the same way I would treat any student having comparable performance problems." Indeed, according to Kinney,

> [a]t no time while John Doe was on the Ob/Gyn clerkship through the appeal of his grade did I perceive that John Doe had a disability. John Doe never notified me of any facts suggesting he was disabled, and I was never informed by John Doe of any accommodations he required because of an alleged disability.

Doe stated that he did not remember whether he ever told Kinney he had a disability.

Doe appealed his grade, complaining that the Ob/Gyn process allows a "single person that has strong oppositional feelings against a student to have profound effects on the outcome." He complained that he did not receive copies of all the relevant evaluation forms from the faculty. Doe characterized the summary of the comments on his grade sheet as "obscure and hardly justifiable."

The appeal was unsuccessful. The SEC concluded that Doe did not show by the weight of the evidence that the grade/evaluation in the Ob/Gyn clerkship was improper or unfair.

Dr. Carl V. Smith, the chair of the Ob/Gyn department, stated that he had spoken with Doe about his grade and the appeal process. Smith stated Doe never informed him that he had a disability or that he required an accommodation for a disability. Smith averred that he treated Doe as he would have treated any other student and that all his actions concerning Doe were in good faith.

Doe testified that his experience with the Ob/Gyn clerkship and the unsuccessful appeal "had a big impact" on him. Doe explained that it was "very stressful," especially "because they didn't do any evaluations and they were claiming that I did stuff that didn't happen."

(b) Internal Medicine

The attending evaluations for Doe's internal medicine clerkship were at a passing level. However, Doe failed the "OSCE" and national shelf exams, and he had "weak performance in other areas." Doe accordingly received an overall grade of fail for the clerkship.

According to Doe, Dr. David O'Dell, the internal medicine clerkship director, told Doe he could not appeal his grade, because he had failed the shelf exam and "that's an automatic failure of the class." O'Dell denied ever telling Doe he could not appeal. O'Dell stated that he did tell Doe that "he would be better served if he repeated the Internal Medicine Clerkship."

O'Dell averred that at no time did Doe tell him he was disabled. Nor did O'Dell have knowledge of any facts that led him to believe Doe was disabled. Doe did not ask O'Dell for accommodation of any alleged disability. O'Dell averred that all of his actions concerning Doe were "in good faith performance of my duties as a faculty member of the College of Medicine."

Doe admitted that he did not recall specifically talking with O'Dell about being depressed. But Doe stated that because O'Dell was on the SEC when it approved his leave of absence, he assumed O'Dell was "aware of the situation."

(c) Pediatrics

Doe received a grade of marginal for his pediatrics clerkship, principally because Doe did not receive the required minimum score on the "NBME Subject Exam."

Doe's clinical grade for the clerkship was 2.79 out of 4.00. The "*Comments for the Student*" section of the evaluation form stated that attendings had observed that Doe needed to work on developing therapeutic plans. Furthermore,

"[a]s was discussed during the clerkship, you also need to be sure you are communicating with the appropriate individuals for absences."

In a letter to Hill on December 14, 2006, Dr. Sharon Stoolman, the director of undergraduate medical education for the department of pediatrics, explained that Doe exhibited "unpredictable behavior." Stoolman illustrated that Doe once missed 2 days on inpatient rounds without proper notification and that she resorted to calling Doe's parents when she was unable to reach him by cell phone or e-mail. Doe denied missing days for anything other than illness. He further alleged that he always notified his supervising physician in person or by e-mail.

Stoolman averred that at no time did Doe tell her that he had a disability or that he required accommodation for a disability. Stoolman said that she did not suspect that Doe suffered from depression—"I mean, not any more than any of the other medical students." Doe admitted that he did not tell Stoolman that he suffered from depression the first time he took the pediatrics clerkship. He was, in fact, uncertain to what degree he was depressed at that time.

10. Doe Asked to Sign Academic Contract

The SEC determined that Doe would have to repeat his junior year because he received grades of two fails and one marginal during that year. The SEC guidelines list one of the primary justifications for requiring repetition of an entire academic year as two or more grades of fail during the same academic year. When the SEC made its determination, Doe was participating in a family medicine community preceptorship in Fremont, Nebraska.

Doe was asked to sign an academic contract setting forth the conditions for repeating his junior year and the requirements for his continued enrollment. The agreement required Doe to retake all junior clerkships except family medicine. The agreement specified that Doe must receive grades of pass or better in the required repeated clerkships, that he would receive a grade of pass or better on his current family medicine

clerkship, that he would receive grades of pass or better in all senior electives, that he would meet regularly with the student counseling center for assistance with any academic and/or personal issues that arise, and that he would meet regularly with Hill after each clerkship to assess academic progress.

11. Doe Refused to Sign Academic Contract

Doe initially refused to sign the agreement. Hill remembered that Doe had said he could not come in to sign the contract because he was on a family medicine rotation in Fremont.

Eventually, Doe met with Hill. According to Doe, "I told Dr. Hill . . . that I was depressed and I wanted to get help, talk to Dr. Carver, get the necessary help that I needed before I signed anything." Doe also sent Hill an e-mail stating in pertinent part:

> Although I feel like I'm moving forward again, I'm certainly not were [sic] I would like to be. The challenges set before me aren't meager, and if I want to succeed I will need to utilize all of my resources including Dr. Carver. This obviously hasn't happen[ed] yet because I've been in Fremont but I would like the opportunity to take the necessary measures to be successful. I'm concerned that just the desire to excel without addressing the above issues has not been sufficient to achieve my goals in the Family Medicine clerkship.

Doe apparently considered this a request for accommodations and asserted that "Dr. Hill refused to address my mental health and my request for an accommodation and said that if I didn't sign the contract on that day, the matter would be brought before the SEC."

Doe did not sign the contract that day. According to Hill, Doe did not state he was disabled, nor did he request accommodations.

12. SEC Added Professionalism Clause to Academic Contract

Doe was brought before the SEC. Doe could not remember what, if anything, he said to the SEC as an explanation of why he had not signed the contract as the SEC required.

The SEC revised the agreement so that it contained a professionalism clause. The professionalism clause stated that Doe understood that "any ratings of –2 or below on the professionalism ranking system, coupled with any negative comments concerning professional behavior, on any required clerkship or senior elective will be grounds for termination of enrollment."

According to Dr. Robert T. Binhammer, chair of the SEC, the SEC decided to add the professionalism requirement to the contract because unprofessional conduct had been observed by clerkship directors. Hill noted that this clause was added after Doe's initial refusal to sign the document. The SEC considered Doe's failure to sign the original contract "a major breach of professionalism." Thus, the SEC reconsidered the previous documented instances of unprofessional conduct in light of that major breach.

The SEC guidelines provide that the only acceptable grade for a core or clerkship being repeated is a pass: "A grade of Marginal or Fail upon repetition is not acceptable and will result in termination of enrollment." (Emphasis in original.) The SEC guidelines for UNMC further provide that "[a]ny student, who by quality of work, by conduct, or other reason indicates unfitness to enter the practice of medicine, may be dismissed from the College." The guidelines are to be considered in light of each student case and will be considered on its own merits. The guidelines' "Termination of Enrollment" section lists failure to obtain a grade of pass in a repeated core, clerkship, or elective as one of several criteria considered justifying termination. That list also includes "[d]ocumentation of repeated unprofessional behavior."

In October 2006, Doe signed the revised agreement under threat of dismissal. Hill had a conversation with Doe when he finally came in to sign the revised academic contract. Hill remembered that Doe said only that "he wanted to see Dr. Carver." Doe did not inform him he had a disability.

13. General Practices Concerning Academic Contracts

Doe presented evidence that from August 2003 through 2008, UNMC required 43 of its students to repeat an academic

year. This was, on average, approximately 9 students per year. The vast majority of those students were asked to repeat their freshman year. Only three students were required to repeat a year other than their freshman year.

Only six of the students during that period who were required to repeat a year were required to sign an academic contract with UNMC for continued enrollment. No student with a documented disability and who was required to repeat a year was required to sign an academic contract for continued enrollment.

Of the students required to sign an academic contract, only the contracts for upperclassmen had requirements pertaining to current clerkships or other courses or clerkships beyond the academic year being repeated. No student, besides Doe, was required to sign a professionalism clause. There was no evidence, however, that any other student had ever refused to sign a proposed academic contract.

Binhammer explained that each academic contract is individualized to meet the needs of the student and that there is "no set contract for all students." And, according to Hill, "professionalism issues arise very rarely."

14. Doe Performed Poorly in Plastic Surgery Rotation

Doe began the remediation of his junior year with his surgery rotations. Doe received all acceptable professionalism marks, with one –1, in his general surgery rotation. He received all –1 marks in his emergency room surgery rotation. Doe's plastic surgery rotation went more poorly. Doe received ratings of –2 or below on the professionalism ranking system, coupled with negative comments concerning professional behavior, which was a violation of the academic contract he signed.

Doe's plastic surgery rotation began on a Monday, October 9, 2006. Doe claimed that on Wednesday, October 11, Dr. Michael L. Spann, a fellow in the plastic and reconstructive surgery program, "did not show up for rounding for which he had required the [sic] me to attend." According to Doe, when Doe later asked Spann about not showing up, Spann "maligned" him in front of a faculty plastic surgeon who was

nearby. According to Doe, Spann later explained to Doe that Spann was actually upset because "the attending had overheard me ask [Spann] about not being at rounds that morning and he was worried that the Faculty Plastic Surgeon would find out that [Spann] had been at home sleeping."

Spann confirmed that on October 11, 2006, he did not attend 6 a.m. rounds, but stated, "However, my absence should not have prevented [Doe] from rounding with the residents on this service." Spann generally denied that he was in any way embarrassed by Doe or that he had told Doe anything to that effect.

Doe stated he began to feel ill by that Sunday, and was unable to work the following Monday and Tuesday because of pain from an umbilical hernia. Doe scheduled surgery for Friday at 4 p.m., after the scheduled surgery shelf exam at 8 a.m. Doe knew he would not be able to eat or drink anything beginning at midnight of Thursday, but he wanted to take the exam before his surgery anyway. Doe went to work on Wednesday and Thursday of that week.

Spann informed Doe on Thursday that he would need to go on rounds the next morning—which was the morning of Doe's exam and his surgery. Doe did so. He arrived at 6:30 a.m. and was released at 7:20 a.m., before either the exam or the scheduled surgery.

Spann stated that he required Doe to go on rounds with him that morning "to provide him the opportunity to demonstrate the ability to evaluate a surgical patient, formulate a care plan and discuss surgical principles, as was standard to the academic process." Spann had determined that because of Doe's poor performance during the rotation, it was "imperative that he demonstrate the ability to evaluate a surgical patient, formulate a care plan, and discuss surgical principles before moving to another service."

Doe testified that because he lived far away, he had to get up at 4:30 a.m. to get to rounds on time. According to Doe, that "changed the whole scenario." Doe did not take the shelf exam.

In an e-mail to Dr. Wendy J. Grant, the associate director of the medical student clerkships in the department of

surgery, Spann summarized Doe's performance during the 2-week plastic surgery rotation. Spann wrote that Doe "continually demonstrated a lack of responsibility to the service and his education." Doe failed to show up for rounds one day, claiming that he did not know he was supposed to be there, even though Spann's recollection was that they had discussed Doe's required presence the afternoon before. Doe generally demonstrated "critical weaknesses in many areas," including "knowledge base, communication, responsibility, motivation, and patient care." In a professionalism checklist, Spann gave Doe the lowest score of –3 in four out of six areas listed on the checklist.

Spann averred that Doe never informed him that he had a disability, and Spann had no knowledge of any facts which led him to believe Doe had a disability. Grant similarly averred that she had no knowledge of any facts leading her to believe Doe had a disability, that Doe never informed her he had a disability, and that Doe never requested an accommodation of a disability. Grant averred, "I treated John Doe as I would treat any student who acted in a manner similar to John Doe." Doe did not deny that Spann and Grant were not informed he had a disability.

Doe's failure to timely notify the surgery department that he would not be taking the shelf exam as scheduled eventually led to the SEC's being notified of the poor professionalism mark by Spann. Hill determined that Doe's poor professionalism on the surgery clerkship violated the conditions of his continued enrollment, and Doe was invited to a meeting of the SEC to explain what happened.

15. SEC Terminated Doe's Enrollment

Before the SEC meeting, Doe sent a letter to Binhammer and Hill, summarizing his position. Doe complained that the professionalism clause of his academic contract was most likely due to issues with his Ob/Gyn clerkship, and he alleged that persons involved with the Ob/Gyn clerkship were on the SEC at the time he was asked to sign the contract. According

to Doe, "the decision of the committee held me accountable for previous unsubstantiated issues." Doe said that "these issues have not been resolved and continue to impact me in a devastating way."

Doe then reiterated to the SEC his procedural complaints regarding the Ob/Gyn grade. He complained, for instance, that his grade evaluations from faculty and residents were never shown to him. He reiterated his belief that those evaluations never actually existed. Doe also presented cell phone records in an attempt to disprove some of the Ob/Gyn allegations that Doe did not show up for work or went missing during rounds.

With regard to Spann's decision to make Doe go on rounds the day of the exam and his surgery, Doe wrote:

> I was put in a horrible situation; that I believe was unfair. I was NPO from midnight on Thursday, I was taking Vicodin for abdominal pain, I had to get up at 4:30 AM to be at UNMC in time to round, I was expected to take a test at 8:00 AM, and undergo surgery in the afternoon.

Neither in his letter nor during the meeting before the SEC did Doe allege he had a disability. Binhammer denied having any knowledge that Doe was even depressed and averred the SEC was never informed Doe had a disability. Doe said he had discussed his "depression" with Hill prior to the meeting and with "other people associated with the SEC," whom he could not name. But Doe also said that at this time, "I'm trying to still be strong and not admit that I'm depressed."

The SEC concluded that Doe violated the professional responsibility clause of his continued-enrollment agreement. The SEC determined that Doe's enrollment should be terminated effective November 7, 2006.

Hill testified that the reason for this decision was primarily the fact that Doe received four –3 ratings in his plastic surgery rotation. Hill did not believe that Doe's missing the surgery shelf exam had any role in the SEC's decision to terminate Doe's enrollment at UNMC. Doe never received a final grade for the surgery clerkship.

O'Dell left the SEC meeting early because he had to teach an 8 a.m. class. As he left, O'Dell informed the secretary of his vote for dismissal.

Doe appealed the SEC's decision to the "Appeal Board."

16. Remediation of Pediatrics Clerkship While Appeal Pending

While Doe's appeal to the board was pending, Doe was allowed to repeat his pediatrics clerkship. Although the grade was never entered on his transcript because it was compiled after his termination of enrollment, the final grade for the second time Doe took the pediatrics clerkship was a marginal. This was principally due to his clinical score.

Stoolman communicated concerns about Doe to Hill on December 14, 2006. In her letter, Stoolman said Doe's behavior during the clerkship was "erratic." Doe made "incorrect and inappropriate comments to fragile patients." Doe missed rounds on several occasions, telling other medical students to tell the attending that he was looking for his backpack. Doe was absent from a required group activity both weeks it was offered, and his excuses could not be verified. Doe "simply disappeared for several hours at a time and then reappeared right before check out rounds in the evening." Doe then missed a meeting with Stoolman to discuss his unexcused absences. Stoolman described that she waited for Doe for 2 hours and that he was not where they were planning to meet, not where he had told others he would be, and not where he later told her he was.

Stoolman stated, "I wish [Doe] had been able to be honest and ask for help in whatever it is that he is struggling with, but he has denied any problem other than the stress of being expelled." Stoolman explained that she had met with Doe in an attempt to help him understand that his "actions, behavior and absences were unacceptable," but that she had "tried and failed to help him see this." Stoolman averred that Doe never told her he had any type of disability and that Doe "had no understanding that his performance was unacceptable."

Doe testified that he told Stoolman during his remediation of pediatrics that he "was dealing with depression." Doe testified

that Stoolman told him at that time that if there was anything she could do to help, to let her know. He did not let her know what she could do to help.

Doe generally denied the allegations of unexcused absences, explaining that some absences were due to meetings pertaining to his appeal of the SEC's decision to discharge him. Doe asserted that despite efforts on his part, he was unable to schedule a meeting with Stoolman to clear up such misunderstandings.

17. Appeal Board Upheld Termination

Doe was represented by counsel at the hearing before the Appeal Board. Doe averred that it was only after he obtained counsel did he understand the definition of disability and his rights under the ADA and the Rehabilitation Act.

Doe explained to the Appeal Board that he had experienced a "bout of major depression" following a broken engagement. He explained that he took a leave of absence during his sophomore year "for treatment and recovery."

Doe explained the chain of events that he believed led to his unjust termination from UNMC. Doe said that because he had to make up a required core before taking the USMLE Step 1 exam, the start of his family medicine and surgery clerkships was delayed: "This put me at a disadvantage from the start because I was four months behind and the students I worked with had four extra months of critical experience . . . ."

Doe then described how he was "devastated" by the comments made about him on his Ob/Gyn clerkship evaluation. This was exacerbated by what Doe perceived as the procedural unfairness of the appeal process for his Ob/Gyn grade. Although that grade was no longer directly before the Appeal Board, Doe explained that "I do think it is important for the committee to understand that the grade I received for [the Ob/Gyn] clerkship was arbitrary and capricious and the ripple effect of the experience impacted me much more than just one grade."

This experience, Doe explained, "resurrected some of my depression symptoms." Doe said that while those symptoms

did not interfere with his ability to pass his psychiatry clerkship, his ability to manage all that was going on with the appeal of his Ob/Gyn clerkship "became too much" by the time he took his internal medicine exams.

Doe described that after his leave of absence, he was reluctant to sign the first version of the academic agreement because it encompassed the family medicine clerkship he was still undertaking: "Although the family medicine clerkship was going well, I felt my mental health was deteriorating and I was very concerned about the added pressure this agreement would impact my performance." Thus, Doe said, "I . . . advised Dr. Hill that I was very hesitant to sign an agreement that required a successful grade in family medicine." Doe did not think the addition of the professionalism clause was a fair response to his refusal to sign the first proposed agreement.

Finally, Doe described the situation surrounding his plastic surgery clerkship under the supervision of Spann. Doe said that "[d]espite my illness and scheduled surgery, I was going to try and take the test as scheduled to avoid any questions or controversy." But when Spann insisted that he go on rounds the morning of the test and of his surgery, Doe said, "the physical and emotional weight of it all became too much for me." At that point, Doe explained, he sent an e-mail to the surgery department indicating he would not be taking the exam.

Doe questioned Spann's ability to grade Doe "objectively." Doe believed that Spann was preoccupied with defending his questionable decision to have Doe go on rounds the day of the shelf exam and Doe's hernia surgery. Doe asked the board to take this into account, as well as the fact that the evaluation was based on only 2 weeks of contact, 1 week of which Doe was sick.

Doe's presentation before the Appeal Board was the first time he disclosed his diagnosis of depressive disorder in writing to an official committee of the UNMC College of Medicine. Specifically, Doe provided a medical progress note dated 15 days after the SEC's termination of his enrollment, indicating that Doe suffered from depression and was not sleeping well. Hill said that this was the first time he became aware Doe suffered from major depression or any other disability.

Doe asked the Appeal Board to give him a 6-month leave of absence. Doe explained he would like the opportunity to "really try to get things nailed down and stay on the antidepressants during the remainder of my time."

On December 19, 2006, the Appeal Board upheld the SEC's termination decision. According to Hill, no academic action was taken against Doe because he had a disability or was regarded as having a disability.

18. Dean of UNMC College of Medicine Upheld Termination

Doe thereafter appealed to the dean of the UNMC College of Medicine. In that appeal, Doe alleged that the SEC's termination of his enrollment under the professionalism clause was procedurally improper, because the SEC was not presented with both the rating of –2 or below on the professionalism ranking system and the negative comments concerning professional behavior. Doe also asserted that the membership of the Appeal Board was improper, that the information before the Appeal Board was not the result of its own investigation as required by the SEC guidelines, and that the Appeal Board forced Doe to defend his entire history with the medical school rather than just the incidents of unprofessionalism at issue. Doe did not make any reference to major depression or any other alleged disability.

Doe was not allowed to appeal the grades for his pediatric and surgery clerkships, because they were submitted after Doe's November 7, 2006, date of dismissal and were not included in his academic transcript.

The dean found no merit to Doe's appeal of the dismissal from the medical school.

19. Doe Sues

Doe sued UNMC, the Board of Regents, and several faculty members in their official and individual capacities. His original complaint alleged fraudulent concealment, violations of his substantive and procedural due process rights, breach of contract, and violations of title II of the ADA and the Rehabilitation Act. We disposed of the due process, fraudulent

concealment, and breach of contract claims in his first appeal to this court.[3] We disposed of an amended breach of contract claim in a later appeal.[4]

Doe filed an amended complaint on the ADA and Rehabilitation Act claims, asking for damages and injunctive relief. Following discovery and a hearing, the district court granted the defendants' motion for summary judgment. The court concluded that the actions against the defendants in their individual capacities were not cognizable under the ADA or Rehabilitation Act, and the court dismissed those defendants in their individual capacities from the action. The court then concluded that there was no material issue of fact supporting Doe's claims against the defendants in their official capacities or against UNMC and the Board of Regents. The court assumed for purposes of the summary judgment motion that Doe had a qualified disability under the ADA and Rehabilitation Act, but found no evidence supporting the inference that Doe was otherwise qualified to participate in the program at UNMC or that Doe was excluded on the basis of his disability. Doe appeals.

III. ASSIGNMENTS OF ERROR

Doe assigns, consolidated and restated, that the district court erred in (1) granting summary judgment against him, (2) denying portions of his motions to compel, and (3) failing to sua sponte schedule a hearing relating to the defendants' alleged failure to comply with motions to compel that were granted.[5]

IV. STANDARD OF REVIEW

[1] Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[6]

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[3] *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010).

[4] *Doe v. Board of Regents*, 283 Neb. 303, 809 N.W.2d 263 (2012).

[5] See *Harris v. O'Connor, ante* p. 182, 842 N.W.2d 50 (2014).

[6] *Id.*

[2] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.[7]

V. ANALYSIS

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[8] Similarly, the Rehabilitation Act provides in pertinent part:

> No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.[9]

[3] The ADA provides that the remedies and rights set forth in the Rehabilitation Act shall be applied to violations of title II. Because the ADA sets forth the same remedies, procedures, and rights as the Rehabilitation Act, claims brought under both acts are analyzed together.[10] Despite the slightly

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[7] *Id.*

[8] 42 U.S.C. § 12132.

[9] 29 U.S.C. § 794(a).

[10] See, e.g., *Thompson v. Williamson County, Tennessee*, 219 F.3d 555 (6th Cir. 2000); *Rodriguez v. City of New York*, 197 F.3d 611 (2d Cir. 1999); *Theriault v. Flynn*, 162 F.3d 46 (1st Cir. 1998); *Collings v. Longview Fibre Co.*, 63 F.3d 828 (9th Cir. 1995); *Maddox v. University of Tennessee*, 62 F.3d 843 (6th Cir. 1995), *abrogated on other grounds, Lewis v. Humboldt Acquisition Corp., Inc.*, 681 F.3d 312 ((6th Cir. 2012); *Doe v. University of Maryland Medical System Corp.*, 50 F.3d 1261 (4th Cir. 1995); *Pottgen v. Missouri St. High Sch. Activities Ass'n*, 40 F.3d 926 (8th Cir. 1994).

different language these acts employ, they require a plaintiff to demonstrate the same elements to establish liability.[11]

[4] The district court correctly determined that Doe has no cause of action under the ADA and the Rehabilitation Act against the named individual faculty members in their individual capacities, and therefore correctly dismissed those individuals from the stated cause of action. Government officials cannot be sued in their individual capacities under either title II of the ADA or the Rehabilitation Act.[12] Title II, § 12131(1)(B), of the ADA is limited to actions by a "public entity," and a public entity is defined as "any department, agency, special purpose district, or other instrumentality of a State or States or local government." The Rehabilitation Act is limited to programs or activities receiving federal financial assistance,[13] which have been defined to include, as relevant here, a college, university, or other postsecondary institution.[14] Courts have determined that this provision limits enforcement under the Rehabilitation Act to the program receiving federal financial assistance and that it does not extend to enforcement against the employees who are the indirect recipients of such

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[11] *Halpern v. Wake Forest University Health Sciences*, 669 F.3d 454 (4th Cir. 2012).

[12] See, *Albra v. Advan, Inc.*, 490 F.3d 826 (11th Cir. 2007); *Eason v. Clark County School Dist.*, 303 F.3d 1137 (9th Cir. 2002); *Emerson v. Thiel College*, 296 F.3d 184 (3d Cir. 2002); *Garcia v. S.U.N.Y. Health Sciences Center*, 280 F.3d 98 (2d Cir. 2001); *Walker v. Snyder*, 213 F.3d 344 (7th Cir. 2000); *Baird ex rel. Baird v. Rose*, 192 F.3d 462 (4th Cir. 1999); *Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir. 1999); *Hiler v. Brown*, 177 F.3d 542 (6th Cir. 1999); *Butler v. City of Prairie Village, Kan.*, 172 F.3d 736 (10th Cir. 1999); *Calloway v. Boro of Glassboro Dept. of Police*, 89 F. Supp. 2d 543 (D.N.J. 2000); *Coddington v. Adelphi University*, 45 F. Supp. 2d 211 (E.D.N.Y. 1999). See, also, *Department of Transp. v. Paralyzed Veterans*, 477 U.S. 597, 106 S. Ct. 2705, 91 L. Ed. 2d 494 (1986).

[13] 29 U.S.C. § 794.

[14] 29 U.S.C. § 794(b)(2)(A).

funds and who have no control over whether federal funds are accepted.[15]

We therefore consider the summary judgment order on the underlying merits as against UNMC, the Board of Regents, and the named faculty members in their official capacities. We hold that the district court was correct in finding no issue of material fact preventing summary judgment in their favor.

[5,6] A party makes a prima facie case that it is entitled to summary judgment by offering sufficient evidence that, assuming the evidence went uncontested at trial, would entitle the party to a favorable verdict.[16] After the movant for summary judgment makes such a prima facie case, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.[17]

The evidence presented at the summary judgment hearing, if uncontested at trial, would entitle the defendants to a verdict in their favor. The defendants made a prima facie case that any adverse actions against Doe were for legitimate nondiscriminatory reasons. The only evidence to the contrary was Doe's assertion that the various incidents cited by faculty members in support of their negative professionalism assessments were false. This is not enough to show pretense under the burden-shifting rubric applicable to ADA/Rehabilitation Act claims. It is thus insufficient to rebut the defendants' prima facie case for summary judgment.

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[15] See, *Emerson v. Thiel College, supra* note 12; *Lollar v. Baker*, 196 F.3d 603 (5th Cir. 1999); *Cox ex rel. Dermitt v. Liberty Healthcare Corp.*, 622 F. Supp. 2d 487 (E.D. Ky. 2008); *Montez v. Romer*, 32 F. Supp. 2d 1235 (D. Colo. 1999); *Purvis v. Williams*, 276 Kan. 182, 73 P.3d 740 (2003); *Doe v. Jamaica Hosp.*, 202 A.D.2d 386, 608 N.Y.S.2d 518 (1994). See, also, *Fitzgerald v. Barnstable School Committee*, 555 U.S. 246, 129 S. Ct. 788, 172 L. Ed. 2d 582 (2009).

[16] *Green v. Box Butte General Hosp.*, 284 Neb. 243, 818 N.W.2d 589 (2012); *Thone v. Regional West Med. Ctr.*, 275 Neb. 238, 745 N.W.2d 898 (2008).

[17] *Cartwright v. State*, 286 Neb. 431, 837 N.W.2d 521 (2013).

[7-10] The burden of proving discrimination under the ADA and the Rehabilitation Act remains always with the plaintiff.[18] The burden of production, however, shifts between the parties under the familiar *McDonnell Douglas Corp. v. Green*[19] framework.[20] A student bringing action under the ADA and the Rehabilitation Act for discrimination by an educational institution and its officers in their official capacities must first make out a prima facie case by proving (1) that he or she was disabled within the meaning of the ADA and the Rehabilitation Act; (2) that he or she otherwise was able, with or without accommodations, to meet the academic and technical standards requisite to admission and participation in the school's education program[21]; and (3) that he or she suffered an adverse action because of his or her disability.[22] Once such a prima facie case of discrimination is made, the burden shifts to the defendants to articulate a legitimate, nondiscriminatory reason for the adverse action. Upon such articulation, the burden shifts back to the plaintiff to produce evidence that the stated nondiscriminatory reason is a pretext for discrimination.[23]

[11] Many courts expressly include knowledge of the disability as one of the elements of the plaintiff's prima facie

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[18] See, e.g., *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

[19] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

[20] See, *Kosmicki v. Burlington Northern & Santa Fe R. Co.*, 545 F.3d 649 (8th Cir. 2008); *Mershon v. St. Louis University*, 442 F.3d 1069 (8th Cir. 2006); *Zukle v. Regents of University of California*, 166 F.3d 1041 (9th Cir. 1999).

[21] See 34 C.F.R. § 104.3(l)(3) (2014).

[22] See *Kosmicki v. Burlington Northern & Sanda Fe R. Co.*, *supra* note 20. See, also, e.g., *Childress v. Clement*, 5 F. Supp. 2d 384 (E.D. Va. 1998).

[23] See *Kosmicki v. Burlington Northern & Sanda Fe R. Co.*, *supra* note 20. See, also, e.g., *Falcone v. University of Minn.*, 388 F.3d 656 (8th Cir. 2004).

case.[24] All courts agree that if the defendants did not know of the disability, then they cannot be liable under the ADA or the Rehabilitation Act.[25] Courts find it logically impossible to adversely affect the plaintiff "because of" or "on account of" his or her disability if the defendant did not know the plaintiff was a member of a class of individuals considered disabled.[26] In other words, there can be no causation if there is no actual or constructive knowledge[27] of the disability. The ADA and the Rehabilitation Act do not require clairvoyance.[28]

[12] Several courts have explained that mental disabilities, such as alleged here, are rarely open, obvious, and apparent.[29] Knowledge of limitations or symptoms does not necessarily prove that the defendant knew the condition or symptoms were disabling, and this is especially true for many mental

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[24] See, e.g., *Jakubowski v. Christ Hosp., Inc.*, 627 F.3d 195 (6th Cir. 2010); *Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173 (6th Cir. 1996), *abrogated on other grounds, Lewis v. Humboldt Acquisition Corp., Inc.*, *supra* note 10; *Morisky v. Broward County*, 80 F.3d 445 (11th Cir. 1996); *Fogel v. Trustees of Iowa College*, 446 N.W.2d 451 (Iowa 1989).

[25] See, e.g., *Raytheon Co. v. Hernandez*, 540 U.S. 44, 124 S. Ct. 513, 157 L. Ed. 2d 357 (2003); *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876 (6th Cir. 1996); *Morisky v. Broward County, supra* note 24; *Hedberg v. Indiana Bell Telephone Co., Inc.*, 47 F.3d 928 (7th Cir. 1995); *Pace v. Paris Maintenance Co.*, 107 F. Supp. 2d 251 (S.D.N.Y. 2000); 2 Jonathan R. Mook, Americans with Disabilities Act: Employee Rights & Employer Obligations § 8.03[1][a] (2002).

[26] *Raytheon Co. v. Hernandez, supra* note 25; *Kocsis v. Multi-Care Management, Inc., supra* note 25; *Morisky v. Broward County, supra* note 24; *Hedberg v. Indiana Bell Telephone Co., Inc., supra* note 25; *Pace v. Paris Maintenance Co., supra* note 25.

[27] See, *Monette v. Electronic Data Systems Corp., supra* note 24; *Morisky v. Broward County, supra* note 24; *Miller v. National Cas. Co.*, 61 F.3d 627 (8th Cir. 1995); *Hedberg v. Indiana Bell Telephone Co., Inc., supra* note 25.

[28] See, *Miller v. National Cas. Co., supra* note 27; *Hedberg v. Indiana Bell Telephone Co., Inc., supra* note 25.

[29] See *Taylor v. Principal Financial Group, Inc.*, 93 F.3d 155 (5th Cir. 1996). See, also, e.g., *Miller v. National Cas. Co., supra* note 27; *Hedberg v. Indiana Bell Telephone Co., Inc., supra* note 25.

disabilities.[30] Thus, in other cases, courts have concluded that mere knowledge that the plaintiff had requested time off to deal with stress or depression was insufficient to prove knowledge of a mental disability.[31]

Doe's case largely fails because Doe's testimony that he told some of the faculty members he was "depressed" or "stressed" was insufficient to rebut their testimony that they had no knowledge Doe suffered from a disability. Vague or conclusory statements revealing an unspecified incapacity are insufficient to put the program on notice and charge it with knowledge of a disability.[32] Doe's claim based on the adverse action of failing to accommodate his disability certainly fails for such lack of knowledge, because the success of a failure-to-accommodate claim depends not only on the defendant's knowledge of the disability but also on the plaintiff's proper request for specific accommodations. Doe's litany of other alleged adverse actions, insofar as they are truly adverse actions, fail both for lack of knowledge and for the dearth of any evidence that the defendants' proffered legitimate academic reasons were pretextual. We will assume for purposes of this opinion that Doe was disabled and that he was otherwise qualified to participate in the program.

[13-15] We first address Doe's failure-to-accommodate allegation. Cognizable adverse actions "because of" discrimination include failing to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability.[33] But the plaintiff must identify a specific reasonable accommodation or accommodations that would allow the plaintiff to perform under the

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[30] See *Reeves v. Johnson Controls World Services, Inc.*, 140 F.3d 144 (2d Cir. 1998) (superseded by statute as stated in *Hilton v. Wright*, 673 F.3d 120 (2d Cir. 2012)).

[31] See, *Miller v. National Cas. Co.*, *supra* note 27; *Trammell v. Raytheon Missile Systems*, 721 F. Supp. 2d 876 (D. Ariz. 2010); *Kolivas v. Credit Agricole*, No. 95 Civ. 5662, 1996 WL 684167 (S.D.N.Y. Nov. 26, 1996) (unpublished opinion).

[32] See *Morisky v. Broward County*, *supra* note 24.

[33] See 42 U.S.C. § 12112(b)(5)(A) (2006).

program at issue.[34] Moreover, courts have held that when the program provides reasonable designated channels through which participants must notify the program of the disability and the requested accommodations, then the program is not liable for a failure to accommodate unless the plaintiff utilizes those channels.[35] Only when the plaintiff has met the burden of showing a specific reasonable accommodation is the defendant obliged to rebut the plaintiff's claim by presenting evidence that the plaintiff's requested accommodation imposes an undue hardship.

Several materials presented to UNMC students clearly informed Doe that any needed accommodations were to be requested through the office of services for students with disabilities. It is undisputed that Doe did not notify the office of services for students with disabilities of his alleged disability, and he did not request any accommodations through that office. We find unavailing Doe's arguments that the denial of further postponement of exams and further leaves of absence by Hill and Moore somehow "set the tone for future accommodations,"[36] which excused his failure to properly ask for them. Doe's request for a 6-month leave of absence during his appeal of the dismissal determination was both the improper venue and improper timing. Such requests for "'second chance[s]'" are not considered reasonable accommodations.[37]

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[34] See, *Falcone v. University of Minn.*, *supra* note 23; *Zukle v. Regents of University of California*, *supra* note 20; *Terrell v. US Air*, 132 F.3d 621 (11th Cir. 1998). See, also, *US Airways, Inc. v. Barnett*, 535 U.S. 391, 122 S. Ct. 1516, 152 L. Ed. 2d 589 (2002).

[35] See, *Halpern v. Wake Forest University Health Sciences*, *supra* note 11; *Mershon v. St. Louis University*, *supra* note 20; *Wood v. President & Trustees of Spring Hill College*, 978 F.2d 1214 (11th Cir. 1992); *Frank v. University of Toledo*, 621 F. Supp. 2d 475 (N.D. Ohio 2007); *Abdo v. University of Vermont*, 263 F. Supp. 2d 772 (D. Vt. 2003).

[36] Brief for appellant at 40.

[37] *Burch v. Coca-Cola Co.*, 119 F.3d 305, 320 n.14 (5th Cir. 1997). See, also, *Zukle v. Regents of University of California*, *supra* note 20; *Wynne v. Tufts University School of Medicine*, 976 F.2d 791 (1st Cir. 1992).

We turn now to the various alleged adverse actions which make up the bulk of Doe's arguments, and which may roughly be categorized as disparate treatment claims.[38] Doe of course alleges that his dismissal from UNMC was an adverse action "because of" discrimination, but he also attacks individual actions of varying degrees of causal relationship to that dismissal. Doe asserts that his failing grade in the Ob/Gyn clerkship was the result of discrimination, and he complains that various procedural matters relating to the appeal of that grade were also discriminatory. Doe asserts that certain negative professionalism remarks in his pediatrics clerkship were the result of discrimination. Doe complains that because of discrimination, he was told he could not appeal the pediatrics shelf exam. Doe argues that the terms of the academic contract he signed were discriminatory. Doe argues that the handling of his exams and rounds at the time of his scheduled hernia surgery was the result of discrimination. Finally, Doe argues that his negative professionalism marks pertaining to his plastic surgery rotation were the result of discrimination.

[16] We begin by noting that not every slight is cognizable under the ADA and the Rehabilitation Act.[39] The element of adverse action may be something short of termination or dismissal from a program,[40] but there must be materially adverse consequences affecting the terms, conditions, or privileges under the program, such that a reasonable trier of fact could find objectively tangible harm.[41]

Doe's chief complaint concerns the terms of the academic contract he signed. We conclude that the academic contract did

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[38] See 2 Mook, *supra* note 25, § 8.03.

[39] See *Smart v. Ball State University*, 89 F.3d 437 (7th Cir. 1996).

[40] See, *Derrick F. v. Red Lion Area School Dist.*, 586 F. Supp. 2d 282 (M.D. Pa. 2008); *O'Connor v. College of Saint Rose*, No. 3:04-CV-0318, 2005 WL 2739106 (N.D.N.Y. Oct. 24, 2005) (unpublished opinion). See, also, *Ellis v. Morehouse School of Medicine*, 925 F. Supp. 1529 (N.D. Ga. 1996).

[41] See, *Holcomb v. Powell*, 433 F.3d 889 (D.C. Cir. 2006); *Brown v. Cox*, 286 F.3d 1040 (8th Cir. 2002); *Conley v. Village of Bedford Park*, 215 F.3d 703 (7th Cir. 2000); *Galabya v. New York City Bd. of Educ.*, 202 F.3d 636 (2d Cir. 2000).

not have materially adverse consequences on Doe affecting the terms, conditions, or privileges Doe previously enjoyed under the program at UNMC. The academic contract merely clarified, for Doe, the expectations under the program applicable to all its students.

Specifically, Doe argues that the requirement that he receive a grade of pass or better in all senior electives was a material change to the SEC guidelines, because they state: "Repetition of a year will require repeating the entire course load for the repeated year and earning a grade of Pass in all repeated cores/clerkships . . . ." But the stated reasons for dismissal under the guidelines are not limited to failing repeated classes. It is self-apparent that a student may be dismissed from the medical program upon multiple failing grades. And we also note that there is evidence that other, nondisabled students asked to sign an academic contract had similar requirements.

Doe also argues that the addition of the professionalism clause to the academic contract was an adverse action. He points out that he was the only student who had such a provision added to an academic contract in the previous 5 years. The SEC guidelines clearly state, however, that documentation of repeated unprofessional behavior justifies termination of enrollment. And the junior-year professionalism statement emphasizes the importance of professionalism assessments to the program.

In the employment context, performance improvement plans presenting an employee with clear goals to achieve continued employment or stating the established consequences of certain behaviors are not considered adverse actions cognizable under the ADA or the Rehabilitation Act.[42] Likewise, here, the academic contract Doe signed merely set forth, albeit more specifically to Doe, the established academic consequences for any student who receives repeated poor professionalism marks and failing grades. The academic contract was not an adverse action for which Doe could state a claim under the ADA or the Rehabilitation Act.

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[42] *Haynes v. Level 3 Communications, LLC*, 456 F.3d 1215 (10th Cir. 2006). See, also, *Pierre v. Napolitano*, 958 F. Supp. 2d 461 (S.D.N.Y. 2013).

We will assume for the sake of this opinion that the poor professionalism marks and comments leading up to Doe's dismissal were adverse actions cognizable under the ADA and the Rehabilitation Act, as long as they were "because of" discrimination. But the evidence, viewed in a light most favorable to Doe, fails to show that these marks were "because of" discrimination.

First, as stated, there is no evidence that the faculty making the negative evaluations of Doe in these clerkships knew he was disabled. Kinney averred that she did not perceive Doe as disabled and that Doe did not inform her that he was disabled. Doe could not contradict this statement, testifying that he did not remember what he might have told her. Smith testified that he did not know Doe had a disability and that he treated Doe as any other student. Doe did not contradict that testimony. Spann similarly stated that he had no knowledge Doe might have a disability, and Doe similarly stated nothing to the contrary. Stoolman, who made some comments about Doe's professionalism in his pediatrics clerkships, likewise averred she had no knowledge that Doe was disabled. Doe's only evidence to the contrary was that he had discussed with Stoolman that he was "dealing with depression."

[17] Second, there is abundant evidence that the negative professionalism marks were for legitimate nondiscriminatory reasons. In this regard, we clarify that adverse action may be properly based on conduct even where that conduct is related to the disability.[43] In *Newberry v. East Texas State University*,[44] the court explained that the discrimination under the ADA "is concerned not with symptoms, but with categorization." Thus, adverse action based on the conduct itself is not discriminatory as long as the "collateral assessment of disability plays

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[43] See, *Brumfield v. City of Chicago*, 735 F.3d 619 (7th Cir. 2013); *McElwee v. County of Orange*, 700 F.3d 635 (2d Cir. 2012); *Jones v. American Postal Workers Union*, 192 F.3d 417 (4th Cir. 1999); *Collings v. Longview Fibre Co.*, *supra* note 10; *Maddox v. University of Tennessee*, *supra* note 10. See, also, e.g., *Newberry v. East Texas State University*, 161 F.3d 276 (5th Cir. 1998). See, also, 2 Mook, *supra* note 25, § 8.03[1][d].

[44] *Newberry v. East Texas State University*, *supra* note 43, 161 F.3d at 279.

no role" in the action.[45] In *Halpern v. Wake Forest University Health Sciences*,[46] the court accordingly held that a medical student was properly discharged because of attendance problems and other unprofessional conduct, even if that conduct was a product of his disability, explaining:

> A school, if informed that a student has a disability with behavioral manifestations, may be obligated to make accommodations to help the student avoid engaging in misconduct. But, the law does not require the school to ignore misconduct that has occurred because the student subsequently asserts it was the result of a disability.

[18-20] The defendants here made a prima facie case that the poor professionalism marks and comments pertaining to Doe were because of their academic judgment that Doe exhibited poor professionalism. As already discussed, Doe did not properly request accommodations to avoid such poor professionalism. In actions under the ADA and the Rehabilitation Act, substantial deference is generally given to academic judgments.[47] Courts are generally ill equipped, as compared with experienced educators, to determine whether a student meets a university's reasonable standards for academic and professional achievement.[48] Evaluating performance in clinical courses is no less an academic judgment than that of any other course, and is entitled to the same deference.[49]

[21] We must be wary that stated academic decisions do not disguise discrimination.[50] But Doe failed to present any

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[45] *Id.* at 280.

[46] *Halpern v. Wake Forest University Health Sciences*, *supra* note 11, 669 F.3d at 465.

[47] See, e.g., *Halpern v. Wake Forest University Health Sciences*, *supra* note 11; *Wong v. Regents of University of California*, 192 F.3d 807 (9th Cir. 1999); *McGuinness v. University of New Mexico*, 170 F.3d 974 (10th Cir. 1998); *Zukle v. Regents of University of California*, *supra* note 20; *Kaltenberger v. Ohio College of Podiatric Medicine*, 162 F.3d 432 (6th Cir. 1998).

[48] *Wong v. Regents of University of California*, *supra* note 47.

[49] See *Falcone v. University of Minn.*, *supra* note 23.

[50] See, e.g., *Zukle v. Regents of University of California*, *supra* note 20.

evidence creating a material issue of fact that the reasons stated by the faculty were a pretext for discrimination. A reason cannot be proved to be a pretext for discrimination unless it is shown both that the reason was false and that discrimination was the real reason.[51] Stated otherwise, the plaintiff must show circumstances raising a reasonable inference that the real reason for the adverse action was his or her perceived disability.[52] Instances of disparate treatment can support a claim of pretext, but, to do so, the plaintiff must show that he or she and the nondisabled person or persons were similarly situated in all relevant respects,[53] i.e., that they had the same supervisor, were subject to the same standards, and engaged in the same conduct without differentiating or mitigating circumstances.[54] Doe presented his testimony disputing the veracity of many of the instances cited by faculty in support of his marks of poor professionalism, but nothing more. Such testimony is insufficient to overcome the defendants' prima facie case for summary judgment on these allegations.

Doe also alleges procedural inequities "because of" discrimination. He claims that evaluations leading up to his Ob/Gyn grade were created after the grading session and that some evidence was not disclosed to Doe before the hearing to the Appeal Board. He claims that O'Dell told him he could not appeal his pediatrics grade. He complains that certain documents relating to his plastic surgery evaluation may not have been presented to the SEC. He complains it was discriminatory to refuse to allow him to appeal his surgery rotation grade on the ground that he had already been dismissed. Finally, he complains that O'Dell's leaving the SEC meeting early, while giving his vote for dismissal, was evidence of discrimination.

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[51] *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796 (6th Cir. 1994).

[52] See *Kosmicki v. Burlington Northern & Santa Fe R. Co.*, *supra* note 20.

[53] See, *Ryan v. Capital Contractors, Inc.*, 679 F.3d 772 (8th Cir. 2012); *Norville v. Staten Island University Hosp.*, 196 F.3d 89 (2d Cir. 1999).

[54] *Macy v. Hopkins County Bd. of Educ.*, 429 F. Supp. 2d 888 (W.D. Ky. 2006).

[22] We find that these stated procedural acts were not materially adverse. As already noted, Doe's due process and breach of contract claims relating to these matters have failed. Doe fails to illustrate in this appeal how these procedural matters caused a tangible harm. We further note that the deference extended to academic decisions extends also to the procedural requirements surrounding those decisions.[55] Doe presented no evidence of discriminatory intent or that such alleged procedural defects did not occur with nondisabled students.

We are uncertain how precisely to categorize Doe's complaints surrounding being asked to go on rounds the day of his hernia surgery, but we find no discernible harm in these acts. Doe never received a final grade in his surgery clerkship. Also, as stated, neither Grant nor Spann, who are featured in these complaints, knew Doe was disabled. Doe indicates that Spann may have been harsher with him because of an incident where Spann missed rounds and Doe allegedly embarrassed him. Doe also asserts that various statements by Spann were "fabrications and . . . an attempt to excuse the spitefulness of his having [Doe] round prior to the shelf exam."[56] But even if that were true, it would not make a claim under the ADA and the Rehabilitation Act. As stated by another court, "[a] personality conflict doesn't ripen into an ADA claim simply because one of the parties has a disability."[57]

Having found no material issue that the poor professionalism marks were "because of" discrimination, we easily find no material issue that the discharge stemming from those marks was "because of" discrimination. Hill specifically testified that no academic action was taken against Doe because he was disabled or perceived to be disabled. And Doe did not present any evidence that UNMC's proffered legitimate reasons for his dismissal could be rebutted as pretense.

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[55] See *Ellis v. Morehouse School of Medicine*, *supra* note 40. See, also, *Board of Curators, Univ. of Mo. v. Horowitz*, 435 U.S. 78, 98 S. Ct. 948, 55 L. Ed. 2d 124 (1978).

[56] Brief for appellant at 32.

[57] *Uhl v. Zalk Josephs Fabricators, Inc.*, 121 F.3d 1133, 1137 (7th Cir. 1997).

We thus find that the district court was correct in granting summary judgment on Doe's ADA/Rehabilitation Act claims.

Doe's remaining assignments of error concerning the motions to compel and the alleged failure to set a hearing date are likewise without merit. Doe's motions to compel were granted in part and denied in part. The motions pertained to Doe's request for the actual academic contracts of other UNMC students, as opposed to a summary of the terms of such contracts, although we note several academic contracts in the record with names redacted. Doe apparently believes the court erred insofar as it denied the motions to compel and erred by failing to schedule a separate hearing at the expiration of the period in which compelled documents were to be delivered. We have already held that asking Doe to sign the academic contract was not an adverse action, and thus there could be no prima facie case of discrimination based on that event. No amount of discovery pertaining to the terms of other students' academic contracts could create a material issue of fact preventing summary judgment as to this alleged discriminatory act. For that reason, if no other, we find no merit to the errors assigned on the motions to compel.

VI. CONCLUSION

The district court was correct to dismiss the individual defendants in their individual capacities. The remaining defendants made a prima facie case that they were entitled to summary judgment. Doe failed to produce evidence in response that would create a material issue of fact preventing judgment as a matter of law. Doe's assignments of error pertaining to discovery are without merit. We therefore affirm the district court's order.

AFFIRMED.

WRIGHT and STEPHAN, JJ., not participating.

KEVIN FRANCIS KIBLER, APPELLEE, V. CHERYL ANN KIBLER, NOW KNOWN AS CHERYL ANN MCMULLAN, APPELLANT.

845 N.W.2d 585

Filed April 24, 2014. No. S-13-572.

1. **Motions to Vacate: Time.** A court has inherent power to vacate or modify its own judgments at any time during the term at which those judgments are pronounced, and such power exists entirely independent of any statute.
2. **Motions to Vacate: Time: Appeal and Error.** The decision to vacate an order any time during the term in which the judgment is rendered is within the discretion of the court; such a decision will be reversed only if it is shown that the district court abused its discretion.
3. **Judgments: Words and Phrases.** An abuse of discretion occurs when the trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
4. **Court Rules: Waiver.** In appropriate circumstances where no injustice would result, the district court may exercise its inherent power to waive its own rules.

Appeal from the District Court for Sarpy County: MAX KELCH, Judge. Affirmed.

Karen S. Nelson, of Schirber & Wagner, L.L.P., for appellant.

Joni Visek for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

HEAVICAN, C.J.

INTRODUCTION

Kevin Francis Kibler filed a pro se complaint seeking a divorce from Cheryl Ann Kibler, now known as Cheryl Ann McMullan. After filing the complaint, Kevin retained counsel. A trial date was set, but before that date, the parties negotiated a settlement and Cheryl's attorney drafted a decree. When Cheryl refused to sign the decree, Kevin filed a motion to compel. At the hearing on the motion to compel, the court signed and entered a copy of the drafted decree. Cheryl filed a motion to vacate, which was denied. Cheryl appeals the denial of her motion to vacate. We affirm.

BACKGROUND

Kevin and Cheryl were married in 1984. They had no children. On March 19, 2012, Kevin filed a pro se complaint seeking a divorce from Cheryl. The complaint included the statement that the marriage was irretrievably broken. Cheryl filed an answer on June 1, which admitted most of the allegations in the complaint, including that the marriage was irretrievably broken. Trial was set for December 7. The trial date was canceled after counsel advised the court that the parties had reached a settlement.

On January 27, 2013, Kevin filed a motion to compel, stating that the parties' agreement was memorialized by Cheryl in a decree of dissolution attached to the motion as an exhibit and that Cheryl now refused to sign and submit the draft decree. The motion requested that the court enter the decree and award attorney fees. The court held a hearing on the motion to compel on February 11, 2013.

At the hearing, Kevin's attorney appeared but Kevin did not. Cheryl and her attorney were both present. Both parties stated that Kevin signed the decree on January 18, 2013. Arrangements had been made for Cheryl to move her personal property from the house on January 19. Cheryl canceled the scheduled move, apparently because the movers arrived early. Cheryl did not want to sign the decree until after receiving her property. Cheryl's attorney also noted that the decree stated Cheryl would be allowed in the house to see if there was any additional property that belonged to her and that Cheryl had not yet been allowed in the house. The court granted that portion of the motion asking that the decree be entered, signing a copy of the decree which had not been signed by either party. Neither party appealed.

On May 13, 2013, Cheryl filed a motion to vacate, arguing that without a written stipulation between the parties or a stipulation on the record as to what the settlement agreement was, the court was without authority to enter a decree of dissolution of marriage. On May 28, Cheryl filed an amended motion to vacate which added that under Neb. Rev. Stat. § 42-361 (Cum. Supp. 2012), there needs to be a judicial finding or a stipulation between the parties that the marriage is irretrievably

broken and that every reasonable effort to effect a reconciliation has been made. After a hearing, the district court overruled the motion to vacate. Cheryl appeals.

ASSIGNMENTS OF ERROR

Cheryl assigns the following errors of the district court: (1) overruling the motion to vacate when the requirements of § 42-361 were not met and (2) failing to vacate the decree of dissolution of marriage, because neither party had signed the decree, there was not a record of the agreement made in open court, and both the local rules and the statute of frauds prohibit the entry of the decree.

STANDARD OF REVIEW

[1] In Cheryl's brief, she asserts that her motion to vacate was sought as both an equitable remedy and a cure for "'mistake, neglect, [or] omission of the clerk, or irregularity in obtaining a judgment or order'" under Neb. Rev. Stat. § 25-2001(4) (Reissue 2008).[1] However, under Rules of Dist. Ct. of Second Jud. Dist. 2-1 (rev. 1995), Cheryl's May 13, 2013, motion to vacate was filed within the same term as the February 11 decree. Thus, § 25-2001 is not applicable. "[A] court has inherent power to vacate or modify its own judgments at any time during the term at which those judgments are pronounced, and such power exists entirely independent of any statute."[2]

[2,3] The decision to vacate an order any time during the term in which the judgment is rendered is within the discretion of the court; such a decision will be reversed only if it is shown that the district court abused its discretion.[3] An abuse of discretion occurs when the trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[4]

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[1] Brief for appellant at 11.

[2] *Moackler v. Finley*, 207 Neb. 353, 357, 299 N.W.2d 166, 168 (1980).

[3] *Hartman v. Hartman*, 265 Neb. 515, 657 N.W.2d 646 (2003).

[4] *Id.*

ANALYSIS

Findings Under § 42-361.

In her first assignment of error, Cheryl alleges that the district court abused its discretion in overruling her amended motion to vacate, because neither party signed the decree, contrary to § 42-361, and the necessary findings under § 42-361 were not made.

Section 42-361 states:

> (1) If both of the parties state under oath or affirmation that the marriage is irretrievably broken, or one of the parties so states and the other does not deny it, the court, after hearing, shall make a finding whether the marriage is irretrievably broken.
>
> (2) If one of the parties has denied under oath or affirmation that the marriage is irretrievably broken, the court shall consider all relevant factors, including the circumstances that gave rise to the filing of the complaint and the prospect of reconciliation, and shall make a finding whether the marriage is irretrievably broken.
>
> (3) Sixty days or more after perfection of service of process, the court may enter a decree of dissolution without a hearing if:
>
> (a) Both parties waive the requirement of the hearing and the court has sufficient basis to make a finding that it has subject matter jurisdiction over the dissolution action and personal jurisdiction over both parties; and
>
> (b) Both parties have certified in writing that the marriage is irretrievably broken, both parties have certified that they have made every reasonable effort to effect reconciliation, all documents required by the court and by statute have been filed, and the parties have entered into a written agreement, signed by both parties under oath, resolving all issues presented by the pleadings in their dissolution action.

Although the decree was not signed by Cheryl, it was drafted by Cheryl's attorney. At the motion to compel hearing, neither Cheryl nor her attorney indicated that Cheryl had changed her mind about or disagreed with the settlement for

any reason. Instead, Cheryl told the court she would sign the agreement as soon as she received her property from Kevin's house. Kevin and Cheryl both admitted in their pleadings that the marriage was irretrievably broken. We have held that pleadings alone are not sufficient for the court to make a finding that a marriage is irretrievably broken[5]; however, under the circumstances of this case, the district court was not relying on the pleadings alone. Additionally, Cheryl was notified of the court's entry of judgment and could have appealed the decree, but did not. The divorce has since become final, and the interests of justice do not support vacating the decree.

The trial court's decision was not based upon reasons that are untenable or unreasonable, and its action was not clearly against justice or conscience, reason, and evidence. Thus, we hold that the district court did not abuse its discretion in overruling Cheryl's motion to vacate the judgment.

Local Rules and Statute of Frauds.

In her second assignment of error, Cheryl alleges that the district court abused its discretion in not vacating the decree, because its entry violated Rules of Dist. Ct. of Second Jud. Dist. 2-3 (rev. 1995) and the statute of frauds, codified at Neb. Rev. Stat. § 36-105 (Reissue 2008), and because the decree was not signed by the parties and the oral agreement was not made in open court.

Local rule 2-3 states:

> All stipulations not made in open court or in chambers and recorded by the reporter and all agreements of counsel or parties to a suit, must be reduced to writing and signed by the parties making the same and filed with the clerk, or they will not be recognized or considered by the court.

[4] We have recognized that "[i]n appropriate circumstances where no injustice would result, the district court may exercise

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[5] *Brunges v. Brunges*, 255 Neb. 837, 587 N.W.2d 554 (1998). See, also, *Wilson v. Wilson*, 238 Neb. 219, 469 N.W.2d 750 (1991).

its inherent power to waive its own rules."[6] In this case, the agreement between the parties was the subject of a motion to compel and Cheryl objected neither to the terms of the agreement nor to the court's consideration of it under this rule. We conclude that local rule 2-3 was waived by the trial court in this case and that no injustice resulted.

Section 36-105 states: "Every contract for the leasing for a longer period than one year, or for the sale of any lands, shall be void unless the contract or some note or memorandum thereof be in writing and signed by the party by whom the lease or sale is to be made." Cheryl alleges that the statute of frauds applies to the agreement because it transferred property.

Cheryl did not raise the issue of the statute of frauds at the hearing on the motion to compel, and she did not raise it in her motion to vacate. The question before us now is not whether the parties' agreement was enforceable, but, rather, whether the district court abused its discretion in overruling the motion to vacate. As we have concluded above, under the circumstances of this case, the district court did not abuse its discretion in overruling the motion to vacate.

CONCLUSION

For the foregoing reasons, the decision of the district court is affirmed.

AFFIRMED.

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[6] *Heese Produce Co. v. Lueders*, 233 Neb. 12, 22, 443 N.W.2d 278, 284 (1989). See, also, *Woodmen of the World Life Ins. Soc. V. Kight*, 246 Neb. 619, 522 N.W.2d 155 (1994).

JIMMIE KOTROUS, APPELLANT, V. RYAN ZERBE ET AL., APPELLEES.

846 N.W.2d 122

Filed April 24, 2014. No. S-13-589.

1. **Motions to Dismiss: Jurisdiction: Appeal and Error.** Aside from factual findings, the granting of a motion to dismiss for a lack of subject matter jurisdiction is subject to a de novo review.
2. **Judgments: Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach its conclusion independent of the trial court.
3. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction is a court's power to hear and determine a case in the general class or category to which the proceedings belong and to deal with the general subject involved in the action before the court and the particular question which it assumes to determine.
4. **Constitutional Law: Jurisdiction: Words and Phrases.** The terms "chancery" and "common-law" jurisdiction used in Neb. Const. art. V, § 9, must be read in the light of their historical use and definition when incorporated as a part of the state Constitution of 1875.
5. **Courts: Jurisdiction.** District courts have jurisdiction over any civil proceeding that could have been brought in the English equity or common-law courts.
6. **Courts: Jurisdiction: Legislature.** The "common-law" jurisdiction conferred to the district courts is beyond the power of the Legislature to limit or control.
7. **Actions: Contribution.** An action for contribution for fence construction or maintenance is not a common-law cause of action.
8. **Courts: Jurisdiction: Contribution.** Neb. Rev. Stat. § 34-112.02 (Reissue 2008) explicitly confers jurisdiction over contribution cases related to division fences to the county courts.
9. **Breach of Contract.** Breach of contract is a common-law action.
10. **Pleadings: Notice.** Under the liberalized rules of notice pleading, a party is only required to set forth a short and plain statement of the claim showing that the pleader is entitled to relief. The party is not required to plead legal theories or cite appropriate statutes so long as the pleading gives fair notice of the claims asserted.
11. **Breach of Contract: Pleadings: Proof.** For breach of contract, the plaintiff must plead the existence of a promise, its breach, damages, and compliance with any conditions precedent that activate the defendant's duty.

Appeal from the District Court for Knox County: JAMES G. KUBE, Judge. Reversed and remanded for further proceedings.

George H. Moyer, of Moyer & Moyer, for appellant.

James P. Meuret for appellees.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

MCCORMACK, J.

NATURE OF CASE

Jimmie Kotrous filed a complaint against defendants Ryan Zerbe; Lyle J. Sukup; Kristen A. Sukup; Ryan Camden; AgriBank FCB; and Farm Credit Services of America, FLCA, seeking payment for a boundary fence he built between his property and the property in which the defendants have or had an interest. The district court for Knox County dismissed the complaint for lack of subject matter jurisdiction, finding that the county courts had exclusive jurisdiction over fence contribution cases. Kotrous now appeals.

BACKGROUND

In the complaint filed with the district court, Kotrous alleged that he had an agreement with the Sukups to build a new boundary fence between his property and the Sukups' property. As part of this agreement, Kotrous alleged that the Sukups agreed Kotrous would build the entirety of the fence and that both parties would share equally in the cost. Kotrous and three other people constructed the fence using supplies and equipment obtained by Kotrous. The Sukups never paid Kotrous and later sold their land to Zerbe and Camden. Zerbe and Camden then gave a deed of trust to AgriBank FCB and Farm Credit Services of America. Kotrous sought damages from each of these defendants.

The district court granted Zerbe and Camden's motion to dismiss solely on the ground that the district court lacked subject matter jurisdiction. The district court found that Kotrous' cause of action arose under Nebraska's "fence law," which is codified under Neb. Rev. Stat. §§ 34-101 to 34-117 (Reissue 2008 & Cum. Supp. 2012). It held that under § 34-112.02, the Legislature had granted jurisdiction to the county courts to the exclusion of the district courts. Kotrous now appeals.

ASSIGNMENT OF ERROR

Kotrous assigns that the district court erred by dismissing the complaint for lack of subject matter jurisdiction.

STANDARD OF REVIEW

[1,2] Aside from factual findings, the granting of a motion to dismiss for a lack of subject matter jurisdiction is subject to a de novo review.[1] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach its conclusion independent of the trial court.[2]

ANALYSIS

The sole question presented by this appeal is whether the district court has subject matter jurisdiction over Kotrous' complaint. Kotrous argues that his complaint is not simply an action for contribution, but is also a common-law contract action which is subject to the district court's jurisdiction. We agree.

[3-5] Subject matter jurisdiction is a court's power to hear and determine a case in the general class or category to which the proceedings belong and to deal with the general subject involved in the action before the court and the particular question which it assumes to determine.[3] Neb. Const. art. V, § 9, provides that "district courts shall have both chancery and common law jurisdiction, and such other jurisdiction as the Legislature may provide." The terms "chancery" and "common-law" jurisdiction must be read in the light of their historical use and definition when incorporated as a part of the state Constitution of 1875.[4] Accordingly, we have held that district courts have jurisdiction over any civil proceeding that could have been brought in the English equity or common-law courts.[5]

[6] The "common-law" jurisdiction conferred to the district courts is beyond the power of the Legislature to limit or control.[6] Thus, although the Legislature can grant jurisdiction

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[1] *Trumble v. Sarpy County Board*, 283 Neb. 486, 810 N.W.2d 732 (2012).

[2] *Id.*

[3] *Schweitzer v. American Nat. Red Cross*, 256 Neb. 350, 591 N.W.2d 524 (1999).

[4] *State, ex rel. Wright, v. Barney*, 133 Neb. 676, 276 N.W. 676 (1937).

[5] *Id.*

[6] See *Susan L. v. Steven L.*, 273 Neb. 24, 729 N.W.2d 35 (2007).

to county courts over specific actions, the district court still maintains concurrent original jurisdiction for common-law and equity actions.[7]

[7] An action for contribution for fence construction or maintenance is not a common-law cause of action.[8] At common law, a land owner could not be compelled to build a partition fence.[9] A party, therefore, by the erection of such fence, acquired no right of action for contribution from the owner of adjoining land.[10]

To create a cause of action for contribution, the Nebraska Legislature passed a "fence law," which directs that two or more adjoining landowners shall construct and maintain a division fence between them, with the costs being equitably allocated between the landowners, unless otherwise agreed to by the adjoining landowners.[11] Should an adjoining landowner refuse to share in the costs, the landowner is empowered to bring an action for contribution.[12] The landowner may commence the "action in the county court of the county where the land is located."[13] To commence the action for contribution, the landowner shall file "a fence dispute complaint . . . provided to the plaintiff by the clerk of the county court."[14]

[8,9] By its plain terms, we find that § 34-112.02 explicitly confers jurisdiction over contribution cases related to division fences to the county courts. But Nebraska's "fence law" cannot deprive the district court of its subject matter jurisdiction over common-law causes of action. And breach of contract is a common-law action.[15]

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[7] *Iodence v. Potmesil*, 239 Neb. 387, 476 N.W.2d 554 (1991).

[8] See *Burr v. Hamer*, 12 Neb. 483, 11 N.W. 741 (1882).

[9] *Id.*

[10] *Id.*

[11] § 34-102.

[12] § 34-112.02.

[13] § 34-112.02(2).

[14] *Id.*

[15] See *Tilt-Up Concrete v. Star City/Federal*, 261 Neb. 64, 621 N.W.2d 502 (2001).

[10,11] To determine whether Kotrous pled breach of contract, we evaluate the complaint. Under the liberalized rules of notice pleading, a party is only required to set forth a short and plain statement of the claim showing that the pleader is entitled to relief.[16] The party is not required to plead legal theories or cite appropriate statutes so long as the pleading gives fair notice of the claims asserted.[17] For breach of contract, the plaintiff must plead the existence of a promise, its breach, damages, and compliance with any conditions precedent that activate the defendant's duty.[18]

Here, we find that Kotrous set forth a short and plain statement showing why he was entitled to relief for breach of contract. Kotrous pled that the Sukups promised to pay for one-half of the fence, that they did not pay, that such breach caused damages, and that the fence construction was completed.

Therefore, the district court erred in dismissing Kotrous' complaint. The district court has jurisdiction to consider Kotrous' breach of contract claims; his common-law, quasi-contract claims[19]; and any other common-law causes of action that Kotrous properly pled. The district court does not, however, have jurisdiction over any contribution claim arising under Nebraska's "fence laws" found under §§ 34-101 to 34-117.

CONCLUSION

For the reasons stated herein, we reverse the judgment and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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[16] *Davio v. Nebraska Dept. of Health & Human Servs.*, 280 Neb. 263, 786 N.W.2d 655 (2010).

[17] *Id.*

[18] See *Production Credit Assn. v. Eldin Haussermann Farms*, 247 Neb. 538, 529 N.W.2d 26 (1995).

[19] See *City of Scottsbluff v. Waste Connections of Nebraska, Inc.*, 282 Neb. 848, 809 N.W.2d 725 (2011).

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